114

No. : 08-890

In the

Supreme Court of the United States

JEHED DIAMOND and JOSEPH BETESH, et al.,

Petitioners,

v.

DAVID PATERSON, et al.,

Respondents.

OSCAR DIAZ, et al.,

Petitioners,

v.

DAVID PATERSON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court in *Connecticut v. Doehr, 501 U.S. 1* (1991) established the standard to evaluate prejudgment remedies used by private claimants to restrict homeowners' property rights. The decision below, in conflict with other courts applying *Doehr*, sustained New York's lis pendens law, permitting restraint of property without any of the safeguards required by *Doehr*, on the ground that the filer of the lis pendens claims some interest, sometimes merely an unsecured interest, in the real property.

1. Does the New York law deny due process by impairing the alienability of real property without providing (a) notice of the lis pendens or the procedures available to challenge it, (b) an opportunity for a probable cause hearing, (c) a bond procedure affording the homeowner some protection from an improper lis pendens, and (d) protection for co-owners of the property?

2. Do the limitations on litigable issues when individuals seek to have a lis pendens cancelled violate the First Amendment right of access to judicial redress, including the right to raise constitutional challenges to the lis pendens law itself?

PARTIES TO THE PROCEEDING

1. The petitioners are Jehed Diamond, Joseph Betesh, and Oscar Diaz.

2. The respondents are:

   David Paterson, Governor of the State of New York

   Andrew Cuomo, Attorney General of the State of New York

   Thomas P. DiNapoli, Comptroller of the State of New York

   Hector Diaz, Clerk of the County of Bronx

   Gloria D'Amico, Clerk of the County of Queens

   Sharon A. O'Dell, Clerk of Delaware County

   Christopher Jones

   Abraham Betesh

   Chuchill Mortgage Investment Corporation

CORPORATE DISCLOSURE STATEMENT

There are no parents or subsidiaries whose disclosure is required under Rule 29.6.

TABLE OF CONTENTS

Page

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

BASIS FOR SUPREME COURT JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

I. The Statutory Scheme for a Notice of Pendency 3

II. The Claims of Petitioners 8

A. The Lis Pendens on Diamond's Home Imposed by an Unsecured Creditor of her Estranged Husband 8

B. The Ex Parte Notice of Pendency Placed on Betesh's Home and Rental Property and his Futile Efforts to Cancel it in State Court 11

C. The Ex Parte Notice of Pendency in Diaz's Predatory Mortgage 13

III. The Proceedings and Decisions in District Court 14

IV. The Circuit Court Opinion 16

REASONS FOR GRANTING THE PETITION 20

I. DENYING THE PROPERTY OWNER NOTICE AND A PROBABLE CAUSE HEARING BEFORE OR AFTER A HOME IS RENDERED INALIENABLE SOLELY BECAUSE A PRIVATE LITIGANT HAS MADE UNEXAMNED ALLEGATIONS OF INTREST IN THE PROPERTY DENIES DUE PROCESS 24

A. The Private Interest Affected is Significant Because Lis Pendens Effectively Prevents the Property from being Alienated 26

B. The New York Lis Pendens Statute has no Due Process Safeguards against the Significant Risk of Erroneous Deprivation 26

C. The Risk of Error is Compounded by the Lack of Notice of the Lis Pendens 28

D. The Lack of a Probable Cause Hearing Increases the Chance of Erroneous Deprivation of Property 29

E. The Lack of a Bond Further Deprives the Property Owner of Another Safeguard 30

F. Neither the State nor the Creditor has a Legitimate Interest in Procedures that Deny Notice and a Merits Hearing 31

II. THIS COURT SHOULD MAKE CLEAR THAT AN ENCUMBERED PROPERTY OWNER HAS DUE PROCESS AND FIRST AMENDMENT RIGHTS TO CHALLENGE THE CONSTITUTIONALITY OF THE LIS PENDENS 33

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

CASES:

5303 Realty Corp. v. O & Y Equity Corp.,
64 N.Y.2d 313, 320 (1984) 4, 27

Aronson v. City of Akron,
116 F. 3d 804 (6th Cir. 1997) 22

British Int. Ins. Co. Ltd. v. Seguros La Republica,
212 F.3d at 138, 142 (2d Cir. 2000) 23

Cadle Co. v. Gabel,
794 A.2d 1029 (2002) 21

Connecticut v. Doehr,
501 U.S. 1 (1991) ..... passim

Dice v. Lenz,
1996 Conn. Super. LEXIS 1108 21

Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,
544 U.S. 280 (2005) 16

FDIC v. Isban,
870 F. Supp.24 (D. Ct. 1994) 7

Feingold v. Modernos S.E,
1994 U.S. Dis LEXIS 15398 (D. Ct P.R. 1994) 21

Fuentes v. Shevin,
407 U.S. 67 (1972) 20

Gem Plumbing & Heating Co., Inc. v. Rossi,
867 A.2d 796 (R.I. 2005) 23

Good v. U.S.,
510 U.S. 43 (1993) 23

Hercules Chemical Company v. VCI, Inc.,
118 Misc. 2d 814, 825 (Sup. Ct., NY Cty. 1983) .. 27

Hulko v. Connell,
1990 U.S. Dist. LEXIS 12341 (SDNY 1990) 6

In re Sakow,
97 N.Y. 2d 436 (2002) 4, 5

Israelson v. Bradley,
308 N.Y. 511 (1955) 28

Jones v. Flowers,
547 U.S. 220 (2006) 28

Kaufman v. Torkan,
51 AD 3d 977 (2d Dept. 2008) 6

Krimstock v. Kelly,
306 F.3d 40, 44 (2d Cir. 2002) 23

Kukanskis v. Griffith,
430 A.2d 21, 24 (1980) 21, 34

Legal Services Corp. v. Velazquez,
531 U.S. 533, 545-46 (2001) 35

Luedeke v. Village of New Paltz,
63 F. Supp. 2d 215 (N.D.N.Y 1999) 23

Malcolm v. Superior Court,
29 Cal.3d 518, 174 Cal. Rptr, 694,
629P.2d 495(1981) 21

Mathews v. Eldridge,
424 U.S. 319, 334 (1976) 25

Memphis Light, Gas & Water Div. v. Craft,
435 U.S. 1, 13-14 (1978) 28

Mitchell v. W.T. Grant Co.,
416 U.S. 600 (1974) 20, 27, 31

Nassau v. Canaan,
1 N.Y. 3d 134 (2003) 34

North Ga. Finishing, Inc. v. Di-Chem., Inc.,
419 U.S. 601 (1975) 20

Penn Central Corp. v. U.S. Railroad Vest Corp.,
955 F. 2d 158 (7th Cir. 1992) 22

Pinsky v. Duncan,
898 F.2d 852, 863 (2nd Cir. 1990) 26

Reardon v. United States, (en banc)
947 F. 2d 1509, 1518 (1st Cir. 1991) 22

Shawmut Bank of Rhode Island v. Costello,
643 A.2d 194, 201 (R.I. 1994) 23

Sniadach v. Family Fin. Corp.,
395 U.S. 337 (1969) 20

Tri-State Development, Ltd. v. Johnston,
160 F.3d 528 (9th Cir. 1998) 22

United States of America v. Property identified as Lot Numbered 781,
20 F. Supp. 2d 27, 38 (D.D.C. 1998) 22

Williams v. Bartlett,
189 Conn. 471, 457 A.2d 290 (1983) 22

18 U.S.C. § 983 7

28 U.S.C.§ 1254 (1) 2

42 U.S.C. § 1983 35

N.Y. C.P.L.R. Article 62 3

N.Y. C.P.L.R. Article 65 .....5, 7, 14, 21, 24, 33, 34

N.Y. C.P.L.R. 65 (2008) 3

N.Y. C.P.L.R. §6511 4

N.Y. C.P.L.R. §6511.02 4

N.Y. C.P.L.R. §6512 ..... 5, 28

N.Y. C.P.L.R. §6513 5

N.Y. C.P.L.R. § 6514 ..... 6, 7, 13

N.Y. C.P.L.R. § 6514.10 6

N.Y. C.P.L.R. § 6515 ..... 6, 7, 10, 30

N.Y. C.P.L.R. § 8018(a)(1)(3) 5

N.Y. C.P.L.R. § 8020(a) 5

N.Y. C.P.L.R. § 8021(a)(10)..... 4

CPLR. MANUAL §28.30 (2008)..... 31

Domestic Relations Law § 236 B.1 (c) 9

APPENDICES

Page

Appendix A - Order of the Second Circuit, decided October 17, 2008 ..... 1a

Appendix B - Opinion and Order of the District Court, dated February 14, 2007..... 33a

Appendix C - Opinion and Order of the District Court, dated April 26, 2005..... 51a

Appendix D - New York Civil Practice Law and Rules Article 65 - Notice of Pendency .. 78a

PETITION FOR A WRIT OF CERTIORARI

Petitioners Jehed Diamond, Joseph Betesh, and Oscar Diaz respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a – 31a)[1] is reported at 547 F. 3d 88 (2d Cir. 2008). The decision dismissing the Betesh and Diamond complaints, (App. 33a – 51a) is not officially reported, and is available at 2007 U.S. Dist. LEXIS 10073 (S.D.N.Y. 2007). The opinion of the district court dismissing the Diaz complaint (App. 51a – 77a) is reported at 368 F. Supp. 2d 265 (S.D.N.Y. 2005). Three additional unreported opinions of the district court, not in the Appendix because they are not immediately relevant to this certiorari petition, are the district court opinion in the first Diamond case dismissing the complaint on *Rooker-Feldman* grounds (J.A. 129-133), the district court memorandum order denying Diamond's motion for relief pursuant to Fed, R. Civ. P. 60(b)(J.A. 190-95), and the order and opinion consolidating the Betesh and Diamond cases and denying preliminary relief and class certification (J.A. 339-42).

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[1] References denominated App. are to the Appendix attached to this petition. References to the Joint Appendix in the Court of Appeals are denominated J.A.

BASIS FOR SUPREME COURT JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on October 17, 2008. App. 1a. Therefore petitioners' filing is timely and this Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amends. I, XVI
New York Civil Practice Law & Rules, Article 65, §§ 6501-6515 (App. 78a – 85a)

STATEMENT OF THE CASE

Petitioners seek to have this Court reverse the Second Circuit decision below because it directly conflicts with this Court's unanimous decision in *Connecticut v Doehr,* 501 US 1 (1991) mandating that homeowners be provided due process safeguards for "...even the temporary or partial impairments to property rights...." Id. at 11. Petitioners, New York homeowners, challenge the constitutionality of the New York lis pendens statute which permits a private claimant to record a lis pendens without notice to the property owner, and to keep the lis pendens in place for the duration of the litigation without ever having to demonstrate probable cause for the claim, thus rendering the homeowner unable for an extended period of time to sell the property or obtain a mortgage, even when the claim against the

property is ultimately meritless.

The Court of Appeals decision limits the protections required by *Doehr* to prejudgment remedy statutes used in intentional tort and similar cases, radically diminishing the due process rights of petitioners and others subject to prejudgment remedies where the private claimant alleges an "interest" in the property, however dubious. This is an unacceptable conflict with this Court's constitutional precedents and with the implementation and interpretation of *Doehr* by sister circuit courts of appeal and state courts of last resort.

I. The Statutory Scheme for a Notice of Pendency

Historically, filing a notice of lis pendens, also called a "notice of pendency," in New York resulted in a levy upon real property by virtue of an attachment.[2] Over time, the lis pendens and attachment procedures evolved separately, most notably diverging when the attachment statute, N.Y., Civil Practice Law & Rules ("C.P.L.R.") Article 62, was amended in 1977 to add due process protections, in particular an immediate post-attachment hearing where the creditor had to prove

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[2] See Advisory Committee Notes to Article 65, N.Y. C.P.L.R. 65 (2008) which explains the differences between the attachment and lis pendens, but notes that "the practical effect [of the lis pendens and attachment provisions] is usually the same."

grounds for the attachment. Weinstein, Korn & Miller, New York Civil Practice, ¶6201.04 (2008).

The historic purpose of the lis pendens was to notify a potential purchaser of the pending litigation involving the property, because any purchaser's interest would be subject to that of a successful plaintiff. However lis pendens is now a routine provisional remedy permitting private litigants to "...effectively retard the alienability of real property without any prior judicial review," and where the "likelihood of success on the merits is irrelevant to determining the validity of the notice of pendency." *5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 320 (1984); *In re Sakow*, 97 N.Y. 2d 436 (2002).

Obtaining a lis pendens is remarkably cheap and easy; removing one is remarkably expensive and difficult. A state or federal court litigant in New York pays a small fee of 35 dollars or less, depending on location,[3] and files the lis pendens with the county clerk along with a copy of the complaint in the underlying law suit which must allege an interest in the real property. N.Y. C.P.L.R. §6511. The court does not examine either the lis pendens or the complaint, and there is no requirement that the complaint be verified, which "arguably contributes to the instances in which the notice of pendency may be abused by an unscrupulous litigant." Weinstein, Korn & Miller, N.Y. Civil Practice, ¶ 6511.02. The law requires the summons in the case to be served on at least one defendant in the case within 30 days

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[3] N.Y. C.P.L.R. § 8021(a)(10) provides a fee of $35 for filing a notice of pendency in New York City, and $15 elsewhere.

of its filing, N.Y. C.P.L.R. § 6512, but there is no way to assure that the service is ever made. The lis pendens is in effect for three years, unless renewed. N.Y. C.P.L.R. §6513. (App. 80a)

There is no requirement that the notice of pendency ever be served on the property owner, defendant, or any other owner such as the spouse. None of petitioners were ever served. Nor was the lis pendens or referenced in the summons or complaint in the underlying case.

A homeowner, who learns of the lis pendens and seeks to cancel it on the limited grounds permitted, must file a motion, which may include hundreds of dollars of costs, apart from attorney fees.[4] N.Y. C.P.L.R. Article 65 contains no time requirements for hearing or deciding lis pendens cancellation motions, which makes them ineffective for those homeowners who need immediate relief, such as petitioner Diamond, who was unable to get her motion heard in time before the scheduled sale of her house. (J.A. 37)

The grounds to cancel a lis pendens are strictly limited, precluding courts from any consideration of the merits of the underlying action, including whether probable cause for the claims exist. *In re Sakow*, 97 N.Y. 2d at 441. Cancellation

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[4] The property owner must pay $210 for an index number, if not previously purchased; $95 for a request for judicial intervention if it is the first motion in the case, which is typical, and a $45 fee to file a motion. N.Y. C.P.L.R. §§ 8018(a)(1)(3), 8020(a).

is required (1) if service of the summons has not been timely completed; or (2) the action has been settled, discontinued, or abated; or (3) the time to appeal from a final judgment against the plaintiff has expired; or (4) if enforcement of a final judgment against the plaintiff has not been stayed pending an appeal. N.Y. C.P.L.R. § 6514 (a) (App. 80a). Although courts also have discretion to cancel a notice of pendency if "plaintiff has not commenced or prosecuted the action in good faith," (N.Y. C.P.L.R. § 6514 (b) this is a minimal standard requiring at most a facially viable complaint. See Weinstein, Korn, & Miller, NY Civil Practice, ¶ 6514.10, p. 65-70, (commenting on the difficulty of the moving party to establish the lack of good faith).

N.Y. C.P.L.R. § 6515 contains an option, not available in mortgage foreclosure actions, for property owners to post an undertaking to substitute for the lis pendens, but this option is obviously limited to those who can afford it, and substitutes the restraint on assets for the restraint on property. It is only in the circumstance where the property owner is able to post an undertaking that the court has the option of requiring the claimant to post a bond to indemnify the property owner for damages. Although the court has the discretion under N.Y. C.P.L.R. §6514 to require that the plaintiff pay "costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action," attorney's fees are not normally considered an "expense" of the action. See *Hulko v. Connell*, 1990 U.S. Dist. LEXIS 12341 (SDNY 1990); *Kaufman v.*

Torkan, 51 AD 3d 977 (2d Dept. 2008) (denying attorney's fees under N.Y. C.P.L.R. §6514).

When the United States uses the lis pendens in connection with such procedures as debt collection or civil or criminal forfeiture, federal law provides for additional safeguards. Federal criminal defendants, "innocent owners," or government debtors are given notice and considerably more due process protections than petitioners under N.Y. C.P.L.R. Article 65. See, for example, Civil Asset Forfeiture Reform Act, (CAFRA), 18 U.S.C. § 983.

In addition, under Fed. R. Civ. Proc. 64, federal district courts in New York routinely apply other state lis pendens laws, all providing safeguards absent in New York, including detailed notice, the right to a timely probable cause hearing with the burden of proof on the claimant, considerations of proportionality and setoffs or counterclaims. There is no onerous double bonding as in N.Y. C.P.L.R. § 6515, and penalties for misuse and for damages are built into the statute.[5] *See FDIC v. Isban*, 870 F. Supp.24 (D. Ct. 1994) (federal court applies Connecticut probable cause standard in lis pendens discharge hearing).

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[5] See Conn. Gen. Stat. 52-325b(a); N.J. Stat. Ann. 2A-15-7(b).*

II. The Claims of Petitioners

Although the three petitioners come from different walks of life – Diamond is a lawyer, Diaz a mailroom clerk supporting an elderly mother, and Betesh a disabled homeowner depending for his livelihood on income from his rental tenant – all had their homes arbitrarily encumbered by a lis pendens at a time in their lives when they were particularly vulnerable and financially distressed. All three had strong defenses to the state cases against them, but the intolerable burdens created by the lis pendens on their homes forced Diaz and Diamond into disadvantageous settlements. Only Betesh was able to litigate his case to a successful conclusion, but the price was high: the lis pendens prevented him from getting a mortgage to repair his fire-damaged house; he had to live there for more than a year, without the rental income he depended on, until he could finally get the case against him dismissed and the lis pendens cancelled.

A. The Lis Pendens on Diamond's Home Imposed by an Unsecured Creditor of her Estranged Husband

Petitioner Jehed Diamond is a lawyer who at the time of the incidents relating to this case practiced law out of her home in Delhi, New York with her then husband Michael Mendelson, from whom she is now divorced. On May 13, 2002, Diamond learned for the first time that Mendelson, in the grip of an uncontrollable online gambling addiction, had secretly dissipated most of their

marital assets and had secretly taken out a mortgage of $75,000 on their home.[6]

Diamond immediately demanded Mendelson transfer the home to her, which he did on May 17, 2002. The home was then the only remaining marital asset. At this point Mendelson owed Diamond over $300,000 from his dissipation of the marital assets, in addition to the $75,000 mortgage. (J.A. 35). It was undisputed by the parties and found by the Court of Appeals that Diamond was a bona fide purchaser for fair consideration. (App. 8a).

Given her financial distress, Diamond needed to sell her home quickly in order to buy a less expensive home separate from Mendelson, start her own separate law practice, and try to keep her minor son in college. (J.A.70,290,292). Diamond found a buyer for her home and a smaller, less expensive house for herself and her child; the closings were scheduled one after the other on November 13, 2002. (J.A. 292).

Diamond then learned that Mendelson had also secretly borrowed over $250,000 from other people to pay off gambling debts. This included a loan of $90,000 from his friend respondent Jones, to

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[6] Although the marital home title was in Mr. Mendelson's name, it had been purchased with joint funds, and Diamond and Mendelson were intending to change the title but had felt little urgency given that New York law makes formal title to the marital residence irrelevant. (J.A. 34,69), New York Domestic Relations Law § 236 B.1 (c).

whom Mendelson had given a promissory note on March 29, 2002. (J.A. 291, 292).

Jones demanded that Diamond pay off the promissory note. When she was unable to do so, Jones, although agreeing that Diamond was also a "victim" and that she had not known about the promissory note or Mendelsohn's debt, filed a law suit in state court, and a lis pendens. (J.A. 49-50). The state court complaint, although naming both Diamond and Mendelson, called for judgment only against Mendelson. The complaint sought money damages on his promissory note to Jones, and claimed that Mendelson had engaged in a fraudulent conveyance intended to evade repayment of the loan; the complaint did not allege that Diamond knew of the debt at the time of the conveyance. (App. 9a, J.A. 36,293).

Diamond, on learning of the lis pendens, immediately filed an order to show cause to try to get it cancelled on the grounds that more than thirty days had elapsed between the filing of the lis pendens and service of the summons. But the state court did not schedule a cancellation hearing until November 12, 2002, the day before the scheduled closings. In order to complete the sale of the property, Diamond was forced to agree to place $100,000 of the proceeds from the sale in an escrow fund for Jones so the lis pendens would be cancelled and the sale could go through. The escrow was stipulated to be the equivalent to the property owner's undertaking in N.Y. C.P.L.R. § 6515. (J.A.37, 56).

After obtaining counsel, Diamond tried in vain to move for preliminary relief to get back the escrow funds by challenging the constitutionality of the lis pendens in the state court proceeding. When the state judge refused to consider any such claims, in June 2003 Diamond filed her federal complaint challenging the constitutionality of the lis pendens and for preliminary relief to get back the escrow. As is described *infra*, the federal district court dismissed her complaint without reaching the merits. (J.A. 129-33) After this, the enormous financial, personal, and professional strain of the litigation resulted in Diamond settling the state court case by paying Jones most of the money in escrow. (J.A. 296,297). At no time was she ever found to owe Jones anything.

B. The Ex Parte Notice of Pendency Placed on Betesh's Home and Rental Property and his Futile Efforts to Cancel it in State Court

Petitioner Betesh also tried unsuccessfully to get the lis pendens cancelled in state court, and suffered considerable hardship in having to endure the burden of the lis pendens while litigating his state court case to a successful, if belated, conclusion

Betesh had lived in one of the units in his two family home in Queens, New York for over twenty years. A fire in June, 2004 severely damaged the house, and resulted in his rental tenant moving out, depriving him of his only source of income. Betesh, disabled and unemployed, and seeking to repair his

property, obtained a commitment letter for a home equity loan for $60,000 at a favorable 2 per cent interest rate with help from a city program. (J.A. 235, 236).

In August, 2004, Betesh's estranged brother, Abraham Betesh, filed a complaint and lis pendens in Queens County, alleging that more than six years earlier Joseph had used an invalid power of attorney to transfer the home from their mother to himself. Petitioner Betesh learned of the lis pendens only when his loan commitment was revoked because the lender, doing a title search, discovered lis pendens.

Unable to afford a lawyer, petitioner Betesh filed a pro se order to show cause to cancel the lis pendens. Two months later, he learned that the order to show cause had been "denied. " (J.A. 238, 311-312). He subsequently learned after obtaining counsel that the denial was based on his failure to attach the lis pendens -- which he had never received – and the pleadings to his motion, an unwritten requirement he was never told about. (J.A. 238).

Betesh filed his first federal class action challenge to the New York lis pendens law in March 2005 by moving to intervene in the Diaz case and for preliminary relief to lift the lis pendens. But the federal district court dismissed the Diaz case without addressing Betesh's motions. He then filed a second federal complaint on May 11, 2005, again moving for a preliminary injunction, detailing in affidavits how the lis pendens had "wreaked havoc on my life." (J.A. 308-315). By this time, he had lost

rental income for a year, was in default on a back taxes payment agreement with the City, and was the subject of complaints by his neighbor, a state-run mental institution, because rats had moved into the debris and garbage from the fire and multiplied. (J.A.315).

Betesh moved again in the state court to vacate the notice of pendency and dismiss the case. The case against him was dismissed on statute of limitations grounds on May 31, 2005, although the decision was not released until the following month. (J.A. 312). Cancellation of the lis pendens is not automatic, however, and requires another motion. N.Y. C.P.L.R. §6514. It took over three months for the Queens court to get around to granting Betesh's motion for cancellation. The order cancelling the lis pendens was not signed until November 7, 2005, more than a year after the lis pendens was originally filed. Even after the motion was granted, when Betesh reapplied for a mortgage he was informed in November, 2006 that the lis pendens was still on the county books; the county clerk had not yet gotten around to acting on the order. (J.A. 350).

C. The Ex Parte Notice of Pendency in Diaz's Predatory Mortgage

Petitioner Oscar Diaz, living in a home with his elderly mother and three siblings, was victimized by a mortgage scam. (J.A.141). A contractor had approached him to "help" him secure financing for repairs to his fire-damaged home by arranging to have Diaz's lower interest mortgage replaced with a

$65,000 mortgage at 10.5 per cent a year. Diaz received very little from the mortgage, as $53,800 was paid directly to the contractor at the closing, and there were "closing costs" of $8,020. (J.A.141, 161-62).

Because of the high interest rate and the contractor's poor work, which had to be re-done, Diaz eventually defaulted on his mortgage and realized he had to sell or refinance the house. (J.A.141, 162). Before he could do either, on September 4, 2003, the lender filed a notice of pendency and a foreclosure complaint against Diaz. (J.A.162). The Diaz answer and counterclaims in his foreclosure case were not simple; he asserted various predatory lending defenses, including violations of the Truth in Lending law, and state law claims of deceptive practices. (J.A. 142). After filing his federal complaint in this case, he settled the state court case by agreeing to a sale of the home below market value. (J.A. 199).

III. The Proceedings and Decisions in District Court

On June 24, 2003 Jehed Diamond filed a class action complaint challenging N.Y. C.P.L.R. Article 65 as unconstitutional, seeking injunctive relief and damages. She moved for class certification and preliminary injunction to get back the escrow monies she was forced to put up to replace the lis pendens on her home, pursuant to her ongoing state case. Her federal case was dismissed in September, 2003 under the *Rooker-Feldman* doctrine, on the ground

that Diamond was seeking review of state court judgments concerning the same constitutional issues. (J.A. 129-33)

Diamond appealed, and while her appeal was pending, the same counsel filed a nearly identical challenge to the law on behalf of Oscar Diaz, whose home had also been encumbered with a lis pendens in connection with a mortgage foreclosure. In April, 2005, the district court dismissed the Diaz complaint for failure to state a claim. The court distinguished *Doehr*, first, because it involved an attachment, rather than lis pendens "that merely provides notice of a pending claim," and, second, because Doehr held the Connecticut attachment statute unconstitutional, "only in connection with underlying intentional tort actions." (App. 71a,72a).

The district court further held that burden of the lis pendens was "minimal," that there was little risk of erroneous deprivation because suits claiming a pre-existing interest in real property are "uncomplicated matters that lend themselves to documentary proof," and that the interest of creditors and the state in preventing transfers of property pendente lite outweighed the burden on the property owner. (App. 74a-76a) The court assumed that the alternative to the New York lis pendens law would be no lis pendens at all, as opposed to one with additional safeguards.

Betesh, who was desperate to have the lis pendens on his home removed in order to obtain a mortgage to make repairs, had attempted

unsuccessfully to intervene in the Diaz case. After the Diaz case was dismissed without addressing his motion to intervene, he filed a separate class action complaint.

In the meantime, Diamond's appeal was resolved by a stipulated remand after the Supreme Court decided *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), which rendered the *Rooker-Feldman* doctrine inapplicable to the Diamond case. In August, 2006, the district court consolidated the Diamond and Betesh cases, and denied class certification. Diamond and Betesh argued that the decision in Diaz's case should be limited to mortgage foreclosure actions, because of the much greater risk of erroneous deprivation in cases where the claimant did not have a secured interest in the property. However, in February, 2007, the district court dismissed the Diamond/Betesh action, finding it indistinguishable from *Diaz*. (App. 33a-50a). The plaintiffs appealed and reactivated the appeal in Diaz, and the three cases eventually all were heard together.

IV. The Circuit Court Opinion

The Court of Appeals, in a decision written by Chief Judge Dennis Jacobs, affirmed the decisions below that New York's lis pendens law did not offend constitutional due process and equal protection guarantees. The court did not decide whether the lis pendens effected a significant taking of property, and found that the statute provided all the process that was due. (App. 17a).

The Court of Appeals, like the district court, limited the holding of the *Doehr* majority to prejudgment remedy cases where the statute was applied in tort and similar cases, as opposed to cases involving creditors with an existing interest in the property. The court did discuss the factors described in *Doehr* for evaluating whether the prejudgment remedy violated due process, but the analysis was colored by the assumption that the creditor, even an unsecured creditor, had a pre-existing interest in the property that had to be protected.

The court conceded that the marketability of the petitioners' property was impaired. Accordingly, it agreed that the first *Doehr* consideration, the effect of the statutory imposition on the property owner's private interest, supported petitioners' position, "although not so decisively as *Doehr*." App. 23a. On the second *Doehr* factor, the risk of error and probable value of additional safeguards, the court ruled that the fact that the creditor claimed an interest in the property would minimize the possibility of error, and that the challenged statute had sufficient safeguards.

The court disagreed with petitioners that requiring notice of the lis pendens to the property owner would be a valuable additional safeguard, without imposing any costs other than postage on the creditor, particularly since there is no mechanism in place to assure the summons and complaint are actually served on the property owner. The court determined that it was sufficient that the lis pendens statute requires service of the summons

and complaint, which would, if service is made, alert the property owner to the claim, although not specifically to the fact that a lis pendens was filed. (App. 24a).

Regarding the scope of review if a property owner seeks to cancel a notice of pendency, the court noted that likelihood of success is not a relevant consideration for cancellation of a lis pendens under New York law. (App. 25a) The court determined this did not matter, because it was sufficient that the statute provides for cancellation of the lis pendens if the plaintiff in the underlying lawsuit "has not commenced or prosecuted the action in good faith." While conceding that "this standard does not afford the most meaningful process to a property holder burdened by a notice of pendency filed in conjunction with a patently meritless law suit," the court determined that the hearing was nonetheless sufficient. The court acknowledged the statement in this Court's *Doehr* decision that a "mere good faith" standard could result in a deprivation of property without due process, but rejected it as dicta. (App. 26a)

Regarding the last *Doehr* factor, the interests of the claimant and the state, the court decided that these interests were stronger than in *Doehr* because the claimant filing a lis pendens asserts an interest in the property, and because

> [b]y securing the unique property that is the subject matter of the litigation, the New York lis pendens procedure protects the

> court's power over the disposition of that property...Without lis pendens, actions such as those brought against plaintiffs here could be frustrated by transfer or encumbrance of the property in favor of an innocent third party who lacked notice.

(App. 27a)

The court did not consider the petitioners' argument that the alternative to the New York lis pendens statute was not eliminating a statutory lis pendens, but having one with additional safeguards.

The court rejected petitioners' challenge to the substitute bonding provision requiring property owners first post a bond to get a bond for damages this claim, an option not available to indigent property owners, holding broadly that due process does not require security bonds in connection with pre-judgment remedies. (App. 26a) The decision rejected petitioner Diamond's equal protection claims, (App. 29a) and declined to consider petitioners' intertwined but separately briefed first amendment arguments on access to the courts violations "because this issue is raised for the first time on appeal." (App. 15a)

REASONS FOR GRANTING THE PETITION

This case raises nearly all the factors central to this Court's certiorari function. First, the Court of Appeals decision directly conflicts with *Doehr*'s strict protections for homeowners by limiting its precedential scope to prejudgment remedy statutes used in intentional tort and similar cases not involving real property. For assessing the constitutionality of the New York lis pendens and other prejudgment remedies where the claimant alleges an interest in the property, however dubious, the Court of Appeals replaces the *Doehr* test with a deferential standard of review.

The rationale for this weakened constitutional standard is based on the lower courts essentially treating mere allegations of interest in the property as equivalent to pre-existing secured interests, which as a matter of law diminish the due process rights of homeowners. By failing to provide even minimum due process safeguards, the decision below is at odds with this Court's decisions both upholding and invalidating prejudgment remedy statutes. See *North Ga. Finishing, Inc. v. Di-Chem., Inc.*, 419 U.S. 601 (1975) (garnishment of bank account without notice or early probable cause hearing impermissible, notwithstanding bond requirement); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (writ of replevin requires notice and hearing); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (Louisiana writ of sequestration does not deny due process, because it must be authorized by a judge, there is notice and

opportunity for hearing as well as a bond); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (wage garnishment requires notice and prior hearing).

Second, this petition is important because it seeks review of a statute that has escaped constitutional scrutiny for over fifty years. New York has never revised N.Y. C.P.L.R. Article 65 in response to this Court's decisional law on due process[7] with the result that N.Y. C.P.L.R. Article 65 in 2009 most closely resembles a Connecticut lis pendens scheme invalidated nearly thirty years ago. *See Kukanskis v. Griffith*, 430 A.2d 21, 24 (1980) (holding that a lis pendens statute that does not provide for a probable cause hearing violates the Due Process Clause).[8] For New York homeowners

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[7] Subsequent to *Doehr*, the California legislature amended its lis pendens law to require a probable cause inquiry on the merits of the underlying case, putting the burden of proof on the claimant and allowing a nonparty affected by the notice to intervene in the action. Compare Cal. Civ. Proc § 405.32 and comments 1,2,3,4,6 (1992), with *Malcolm v Superior Court*, 29 Cal.3d 518, 174 Cal. Rptr, 694, 629P.2d 495 (1981) (explaining the limited inquiry under California's old lis pendens statute precluding courts from any review of the probablity of success) The Connecticut legislature in response to *Doehr* amended its prejudgment remedy scheme. Many of the revisions, including tightening the probable cause standard and further detailing the notice, apply to both the lis pendens and attachment vacatur or discharge hearings. See *Dice v. Lenz*, 1996 Conn. Super. LEXIS 1108. *Cadle Co. v. Gabel*, 794 A.2d 1029 (2002). See also *Feingold v. Modernos S.E.*, 1994 U.S. Dist. LEXIS 15398 (D. Ct P.R. 1994) (Puerto Rico lis pendens invalid under Doehr; prior notice, hearing and posting of bond are required.)

[8] Since 1980 the Connecticut lis pendens law has been regularly revised, even after the Connecticut Supreme Court

like petitioners, whose due process rights remain frozen in constitutional history, review by this Court would send a signal that no law can forever remain immune to the normal process of judicial review, checks and balances.

Third, this petition seeks review of a Second Circuit decision that radically departs from the application and interpretation of *Doehr* by sister circuits, state courts of last resort, and other panels of the Second Circuit adjudicating related procedural due process issue where various restrictions on property were found sufficient to require due process protections. *See, Reardon v. United States*, (en banc) 947 F. 2d 1509, 1518 (1st Cir. 1991) (liens filed under the Environmental Liability Act denied property owners due process); *Tri-State Development, Ltd. v. Johnston*, 160 F.3d 528 (9th Cir. 1998) (Washington attachment statute invalid despite probable cause hearing, bond, and other safeguards); *Penn Central Corp. v. U.S. Railroad Vest Corp.* 955 F. 2d 158 (7th Cir. 1992) (Posner, J.) (Indiana abandoned railway property law invalid), *Aronson v. City of Akron,* 116 F. 3d 804 (6th Cir. 1997) (Ohio's "corrupt activity" lien statute was not unconstitutional on its face because the lien could only be filed after the jury has found that there is probable cause that the property will be forfeitable, but further holding that the statute may have been unconstitutional as applied); *United States of America v. Property Identified as Lot Numbered 781*, 20 F. Supp. 2d 27, 38 (D.D.C.

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left standing the 1981 version in *Williams v. Bartlett*, 189 Conn. 471, 457 A.2d 290 (1983, appeal dismissed for want of a substantial federal question, 464 U.S. 801 (1983).

1998)(Oberdorpher, J.) (distinguishing dicta in *Good v. U.S.*, 510 U.S. 43 (1993) characterizing a lis pendens as a lesser remedy than seizure, and holding a lis pendens was equivalent to a seizure of the property because it was used to force property owner into making an unfair settlement); *Shawmut Bank of Rhode Island v. Costello,* 643 A.2d 194, 201 - 02 (R.I. 1994) (invalidating Rhode Island attachment law); *Gem Plumbing & Heating Co., Inc. v. Rossi*, 867 A.2d 796 (R.I. 2005) (upholding Rhode Island mechanics lien after it was amended to provide due process safeguards including the right to a prompt hearing on probable cause); *British Int'l. Ins. Co. Ltd. v. Seguros La Republica*, 212 F.3d at 138, 141 (2d Cir. 2000) (the requirement that unlicensed insurance companies in New York post bond before being permitted to defend a case in state court was a significant property deprivation, "the functional equivalent of an attachment"); *Krimstock v. Kelly.* 306 F.3d 40, 44 (2d Cir. 2002) (invalidating car seizure provisions; automobile owners deprived of their automobiles after drunk driving arrests are entitled to due process safeguards including a probable cause hearing); *Luedeke v. Village of New Paltz,* 63 F. Supp. 2d 215 (N.D.N.Y 1999) (invalidating city ordinance imposing an ex parte lien for violation of snow removal ordinance, similar to a lis pendens).

Finally, the petitioners in their three separate federal court cases lasting over five years, repeatedly, albeit in vain, sought preliminary injunctive and other relief from the district court. In so doing, they carefully updated the federal district

judge with undisputed facts documenting their ongoing efforts to deal with the lis pendens that had been placed on their homes. This petition, therefore, presents this Court with a rich district court record documenting the actual workings of N.Y. C.P.L.R. Article 65.

I. DENYING THE PROPERTY OWNER NOTICE AND A PROBABLE CAUSE HEARING BEFORE OR AFTER A HOME IS RENDERED INALIENABLE SOLELY BECAUSE A PRIVATE LITIGANT HAS MADE UNEXAMINED ALLEGATIONS OF INTEREST IN THE PROPERTY DENIES DUE PROCESS

The Court of Appeals fundamentally departed from this Court's analysis in *Doehr* by refusing to acknowledge that the lis pendens creates a significant property deprivation ("We need not decide whether a lis pendens effects a 'significant taking of property'...because we conclude, in deciding what process would be due, that New York's lis pendens statute provides all the process that is due in respect of the claimed property interests at stake.") (App. 17a). The Court of Appeals regarded the district court record documenting the petitioners' property deprivations as essentially irrelevant, and elevated as a matter of law, not fact, the interests of private claimants alleging an "interest" in the real property. Under the court's analysis, this legal fiction creating a "preexisting interest" of the claimant, merely because the claimant asserts one, also serves to transform petitioners into second-class homeowners with virtually no constitutional

protection from meritless, disproportionate, improper, or abusive lis pendens filings. The legal fiction that an asserted interest becomes a kind of quasi-secured interest carries with it a second legal fiction, also disproved by the undisputed facts in the record, that the lis pendens filer has a meritorious case that may be quickly adjudicated. These two legal fictions were the linchpin of the Court of Appeals' decision sustaining the New York lis pendens statute.

The New York lis pendens is clearly invalid under this Court's three-part *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) test, as modified for private claimants by *Doehr*. The test requires:

> consideration of "the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews*, principal attention to the interest of the private party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections."

Doehr, 501 U.S. at 11.

A. The Private Interest Affected is Significant Because Lis Pendens Effectively Prevents the Property from being Alienated

There is no dispute that from the home owners' perspective the practical effect of the lis pendens is identical to that of an attachment.[9] The deprivations listed in *Doehr* as constituting significant property deprivations - such as the clouding of title, inability to sell or otherwise alienate the property; reduction of the chance of obtaining a home equity loan or additional mortgage - apply as well to the lis pendens, as the situations of the petitioners demonstrate. The Court of Appeals recognized the practical consequences of the lis pendens, and accordingly conceded that the lis pendens' effect on the alienability of property supported the petitioners' position with respect to the first part of the *Doehr* test.

B. The New York Lis Pendens Statute has no Due Process Safeguards against the Significant Risk of Erroneous Deprivation

The second part of the *Doehr* balancing test looks at the risk of error and the probable value of additional safeguards. There is no factual or logical

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[9] *See Pinsky v. Duncan*, 898 F.2d 852, 863 (2nd Cir. 1990), affirmed sub nom. *Doehr*, where Judge Newman noted in dissent, "The case for allowing an ex parte lis pendens procedure may be somewhat stronger than the case for allowing ex parte prejudgment attachments, but from the standpoint of the private interest adversely affected, the attachment and the lis pendens are indistinguishable....").

basis for the assumption by the district and circuit court below that cases where the claimant asserts an interest in real property are always the kind of "uncomplicated matters that lend themselves to documentary proof..." (quoting *Mitchell* 416 U.S. at 609. None of the petitioner's cases was "uncomplicated," none could have been adjudicated quickly enough to avoid harm. Even a time-barred case like the one against petitioner Betesh still took over a year to be dismissed, with the lis pendens remaining on his property for months thereafter. As observed years ago by a New York State Supreme Court judge:

> The risk of an erroneous deprivation is substantial; clearly, a large number of plaintiffs who have filed *lis pendens* do not ultimately prevail on their underlying actions; further, the ability to encumber property for substantial periods of time without judicial scrutiny creates the potential for unscrupulous plaintiffs with spurious claims to "hold up" owners, or to force settlements because their unfounded claims remain unexamined.

Hercules Chemical Company v. VCI, Inc., 118 Misc. 2d 814, 825 (Sup. Ct., NY Cty. 1983).[10]

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[10] The court's sua sponte decision in that case requiring a merits hearing has not been followed, and has been implicitly overruled by the New York Court of Appeals decisions explicitly finding that the statute does not require a merits hearing. *5303 Realty*, 64 N.Y. 2d at 320.

The due process safeguards petitioners believe are constitutionally mandated – notice, an opportunity for a probable cause hearing, and a fair bonding procedure -- are not onerous to grant, but would provide significant protections against erroneous deprivations of property.

C. The Risk of Error is Compounded by the Lack of Notice of the Lis Pendens

Notice of the lis pendens would require the filer to mail a notice to the homeowner, certainly not a burden, but a safeguard that would assure the property owner knew of the lis pendens. If there are multiple defendants, only one must be served with the summons in the underlying case within the 30-day period under N.Y. C.P.L.R. § 6512 (App. 81a), and notice of one thing, the filing of case, is not really equivalent to notice of something else, the filing of a lis pendens. Moreover, nothing in the New York procedures assures that the summons and complaint is even served; the only penalty for failure to serve a summons and complaint in a timely way is loss of the opportunity in the future to file another lis pendens on the same property. See *Israelson v. Bradley*, 308 N.Y. 511 (1955) (second lis pendens cancelled because summons and complaint were not served for eight months). This Court has repeatedly reaffirmed the centrality of notice to protect due process rights. See *Jones v. Flowers*, 547 U.S. 220 (2006). The procedure invalidated as insufficient in *Doehr* at least included a notice of the attachment and some guidance as to the procedure to challenge it. *Compare, Memphis Light, Gas & Water Div. v.*

Craft, 435 U.S. 1, 13-14 (1978) (due process requires notice of electrical termination and procedures to contest it). The New York procedure provides no notice at all: the homeowner is not informed that a lis pendens has been filed, and is not informed of the steps to challenge it.

D. The Lack of a Probable Cause Hearing Increases the Chance of Erroneous Deprivation of Property

Requiring a probable cause hearing would also alleviate the risk of error. The Court of Appeals below acknowledged that the hearing provided under New York law "does not afford the most meaningful process to a property holder burdened by a notice of pendency filed in conjunction with a patently meritless law suit." (App. 26a) This Court in *Doehr* explicitly rejected a mere "good faith" hearing. 501 U.S. at 13-14. It is hard to see how claimants with plainly meritorious claims, if indeed they were demonstrable by documentary proof, would be burdened by having to show their cases had merit, but the many claimants who do not have meritorious claims should not be able to evade any review of the merits of their cases, while gaining the enormous leverage of the lis pendens to try to force settlements.

E. The Lack of a Bond Further Deprives the Property Owner of Another Safeguard

The Court of Appeals also ruled that a bond was constitutionally unnecessary, relying on the fact that only a plurality of the Court in *Doehr* had concluded that

> Without a bond, at the time of attachment, the danger that these property rights may be wrongfully deprived remains unacceptably high even with such safeguards as a hearing or exigency requirement. The need for a bond is especially apparent where extraordinary circumstances justify an attachment with no more than the plaintiff's *ex parte* assertion of a claim."

501 U.S. at 19.

Because of its holding that a bond was unnecessary, the court below did not address the problem that results from the New York statutory provision permitting the court to set a bond to protect the property owner only if the property owner first provides an undertaking in the amount of the claim, a requirement that effectively nullifies the bond provision. N.Y. C.P.L.R. §6515. In *Doehr*, there were numerous safeguards to which the property owner was found to be entitled, most particularly a prior hearing. In the lis pendens context, however, the restriction may be imposed without any prior judicial scrutiny, without any opportunity for the property owner to be heard prior

to the lis pendens filing and no effective opportunity to be heard after. The existence of a bond requirement was one of the grounds that the court relied on to permit the sequestration upheld in *Mitchell v. Grant*, 416 U.S. at 608. Accordingly, an ex parte filing affecting a property owner, with no requirement of notice even after the filing, and no hearing available on the merits, should require at least the posting of a bond to protect the property owner from the harm arising from unfounded claims. As noted in *Doehr*, later damage claims are ineffective, particularly in a scheme that generally results in cases being forced to settlement. 501 U.S. at 20.

F. Neither the State nor the Creditor has a Legitimate Interest in Procedures that Deny Notice and a Merits Hearing

The state, potential innocent purchasers, and the claimant may have a valid interest in having claims against real property recorded in an accessible place. But there is no legitimate interest justifying the features of the lis pendens procedure that petitioners challenge. Misuse of the lis pendens procedure, which occurs in the absence of due process rights to the homeowners, does not serve any state interest and indeed undermines the legitimacy of the courts, when unfair settlements are exacted by an abusively filed lis pendens. There is no legitimate interest in denying notice to the property owner that a lis pendens was filed, nor in denying the property owner a prompt probable cause hearing after the lis pendens is filed. As observed in Weinstein, Korn &

Miller, CPLR MANUAL §28.30 (2008), the interest of a plaintiff and of a prospective purchaser in a lis pendens procedure "is not incompatible with the interests of fundamental fairness inherent in due process." Advocating for amendment of the law, they note:

> The statute could be amended to provide for an ex parte application, based on an affidavit of need, to the court in which the action is or will be brought. Following filing, the filing party should have the duty to promptly move for confirmation, and should bear the burden of proving that the need for the notice [of pendency], including a consideration of the merits of the underlying claim, outweighs any prejudice to the property owner." Id.

Therefore, this Court should grant certiorari to assure that lis pendens and similar prejudgment statutes provide, at a minimum, notice to the property owner, an opportunity for a prompt probable cause hearing, and a bond to protect the property owner from damages resulting from unmeritorious claims.

II. THIS COURT SHOULD MAKE CLEAR THAT AN ENCUMBERED PROPERTY OWNER HAS DUE PROCESS AND FIRST AMENDMENT RIGHTS TO CHALLENGE THE CONSTITUTIONALITY OF THE LIS PENDENS

The New York lis pendens scheme effectively precludes homeowners like petitioner Diamond from being able to raise constitutional challenges to the lis pendens statute in the underlying case. Access to the courts for redress of constitutional violations is the most fundamental of rights and the premise of our system of checks and balances. This is a compelling reason for this Court to address petitioners' First Amendment concerns, notwithstanding the Court of Appeals' erroneous statement that the issue had not been raised in the district court (App. 15a).[11]

N.Y. C.P.L.R. Article 65 does not explicitly prohibit homeowners from raising a constitutional challenge, but this is of no consequence since a court precluded from examining the merits of the complaint is not going to leapfrog over that obstacle and address the constitutionality of the law itself. It is no accident that the courts in New York have

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[11] Diamond's complaint at ¶ 5 alleged that "the aggrieved party has no right to raise constitutional challenges in the context of being a defendant in a civil suit." (J.A. 30). The Benshoof affirmation in support of preliminary injunction complains that "N.Y. C.P.L.R. Article 65 closes courtroom doors and gags New York citizens once they get into the courtrooms." (J.A. 320). In the district court, the claim was fully briefed, inter alia, in the Plaintiffs' Memorandum of Law in support of preliminary injunction and class certification dated August 25, 2005, at pp.22-24.

never adjudicated a general constitutional challenge to N.Y. C.P.L.R. Article 65 nor has the New York State legislature significantly revised it since 1957. In contrast, courts adjudicating cases in which the prejudgment schemes provide for a pre- or post-seizure probable cause or merits hearing, regularly address constitutional questions. See, for example, *Nassau v. Canaan*, 1 N.Y. 3d 134 (2003) (challenge to the constitutionality of the New York vehicle forfeiture statute raised and litigated in the context of the seizure hearing); *Kukanskis v. Griffith*, 430 A. 2d at 24 (challenge to the lis pendens raised in motion to cancel led to Court of Appeals decision invalidating Connecticut statute.)

Petitioner Diamond filed her federal complaint in June 2003 only after she had tried to get back the escrow monies she was forced to substitute for the lis pendens in her state court case, including by attempting to challenge the constitutionality of N.Y. C.P.L.R. Article 65 as an affirmative defense and moving for injunctive relief. The state court judge refused to adjudicate any constitutional issue. Diamond, seeking injunctive relief in federal court, stated in her affirmation, "These statutes deny us our critical first amendment rights of access to the courts... I was shocked I could not even get a hearing in state court... on my constitutional objections to Article 65." (J.A. 285, 304-07).

This Court is dependent on lower courts to implement the broad constitutional norms it sets, including the due process standards in *Doehr*. This

cannot happen unless homeowners whose due process rights are violated can get to the lower courts to raise *Doehr* and similar constitutional arguments in the first place. It is unrealistic to expect individuals, deprived of property by a prejudgment remedy, and denied the opportunity to raise the constitutional issue in the context of the underlying lawsuit, to have the resources to mount a separate 42 U.S.C. § 1983 challenge to the law. As a result of denying a forum to raise the constitutional issues, the legislature is deprived of the views of the courts, and statutes such as Article 65 elude legislative attention.

The New York lis pendens scheme imposes insurmountable obstacles for homeowners like petitioner Diamond who seek to assert their rights to constitutional redress. This insulation from constitutional oversight corrupts the system of checks and balances on which our government depends. *See, Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545-46 (2001) (invalidating restrictions on lawyers raising constitutional claims).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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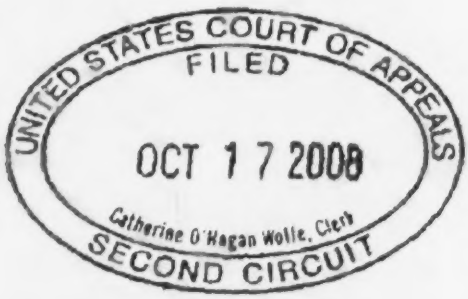
* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Governor David Paterson is automatically substituted for former Governor Eliot Spitzer as the defendant in these cases.

05-2685-cv;06-3942-cv(L), 06-3992-cv(con)
Diaz v. Paterson; Diamond v. Paterson



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: April 1, 2008 Decided: October 17, 2008)

Docket Nos. 05-2685-cv, 06-3942-cv(L),
06-3992-cv(con)

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OSCAR DIAZ,

Plaintiff-Appellant,

- v.-

DAVID PATERSON,* individually and in his official capacity as Governor of the State of New York, ANDREW CUOMO, individually and in his official capacity as Attorney General of the State of New York, THOMAS P. DI NAPOLI, individually and in

his official capacity as Comptroller of the State of New York, HECTOR DIAZ, individually and in his official capacity as Clerk of the County of the Bronx, and on behalf of a defendant class of New York County Clerks and CHURCHILL MORTGAGE INVESTMENT CORPORATION,

Defendants-Appellees.

----------X

JEHED DIAMOND and JOSEPH BETESH, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

- v.-

DAVID PATERSON, individually and in his official capacity as Governor of the State of New York, ANDREW CUOMO, individually and in his official capacity as Attorney General of the State of New York, THOMAS P. DI NAPOLI, individually and in his official capacity as Comptroller of the State of New York, GLORIA D'AMICO and SHARON A. O'DELL, individually and in their official capacity as Clerk of the County of Queens and as Clerk of Delaware County respectively, and on behalf of a defendant class of New York County Clerks, CHRISTOPHER JONES and ABRAHAM BETESH,

Defendants-Appellees.

----------X

Before: JACOBS, *Chief Judge*, KEARSE and POOLER, *Circuit Judges*.

Appeals from final judgments dismissing, as a matter of law, putative class actions alleging that New York's lis pendens law offends constitutional due process and equal protection guarantees. Affirmed.

JANET BENSHOOF (Toby Golick, Cardozo Bet Tzedek Legal Services, *on the brief*), New York, New York, *for Plaintiffs-Appellants.*

BENJAMIN ROSENBERG, Chief Trial Counsel (Barbara D. Underwood, Solicitor General, Michael S. Belohlavek, Senior Counsel, *on the brief*), for Andrew M. Cuomo, Attorney General of the State of New York, New York, New York, *for Defendants-Appellees.*

DENNIS JACOBS, *Chief Judge*:

These putative class actions challenge the constitutionality of the New York law, codified at N.Y. Civil Practice Law & Rules 6501-6516 ("Article 65"), that allows a plaintiff who brings a lawsuit claiming interest in real property to file a lis pendens with respect to the property. The lis pendens (also called a "notice of pendency") alerts future buyers or interest holders of a prior claim. Plaintiffs argue, under *Connecticut v. Doehr*, 501 U.S. 1 (1991), that because the law does not give the property owner prior notice or opportunity to be heard, it violates the Fourteenth Amendment's Due Process Clause. Plaintiffs also challenge the law under the Equal Protection Clause.

These appeals are taken from final judgments, entered on April 28, 2005 and February 14, 2007, in the United States District Court for the Southern District of New York (Stein, J.), dismissing the actions for failure to state a claim. Appeal is also taken from the denial of class certification. We affirm because New York's lis pendens law as applied to plaintiffs does not offend the Constitution, as construed by *Doehr*.

I

Under the common law, the pendency of a lawsuit (a lis pendens) claiming an interest in real property constituted constructive notice of the claim to the world. Whether or not good faith purchasers had actual notice, they took the property subject to the outcome of the action if they acquired the property while the suit was pending. *See generally* 13 Jack B. Weinstein, et al., *New York Civil Practice: CPLR* ¶ 6501.01, at 65-4-4.1 (2008). This "prevent[ed] a defendant from destroying the value of a judgment in the plaintiff's favor by conveying the disputed property during the suit," *id.* at 65-5, and "assure[d] that a court retained its ability to effect justice by preserving its power over the property," *5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 319, 476 N.E.2d 276, 280 (1984), *quoted in In re Sakow*, 97 N.Y.2d 436, 440, 767 N.E.2d 666, 669 (2002). Common law lis pendens attached immediately upon service of process; no separate notice or filing was required. "A potential purchaser of real property was required to search all of the court records to determine whether the land to be purchased or encumbered was the subject of

pending litigation." 13 Weinstein, New York *Civil Practice: CPLR* ¶ 6501.01, at 65-5.

To mitigate the burden imposed by the common law, New York, like most states, replaced it by statute. The New York lis pendens statute was first enacted in 1823. The current version, codified in Article 65, provides that a plaintiff in an action "in which the judgment demanded would affect the title to, or the possession, use or enjoyment of real property," may file a notice of pendency with respect to the real property that is the subject of the action. *See* 18 N.Y. C.P.L.R. 6501. Filing of the notice of pendency effects constructive notice of the action: "A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party." *Id.*

A notice of pendency must be filed "in the office of the clerk of any county where property affected is situated." *Id.* 6511(a). A complaint that states a legally sufficient claim affecting the real property must be filed with the notice of pendency, unless the complaint was filed previously. *Id.* 6501, 6511(a). Effectiveness of the notice is conditional on the service of a summons on the defendant property owner within 30 days. *Id.* 6512. The notice is valid for three years, and may be extended for an additional three years upon a showing of good cause prior to expiration of the initial term. *Id.* 6513. As at common law, "[t]he notice of pendency does not itself actually restrain transfer of the property, as an incumbrance or a lien: it merely provides notice that an action is pending that may affect title to the

property." 13 Weinstein, *New York Civil Practice: CPLR* ¶ 6501.11, at 65-24.

Cancellation of a notice of pendency is available under two sections of the statute. Upon motion of "any person aggrieved," section 6514 provides for discretionary cancellation "if the plaintiff has not commenced or prosecuted the action in good faith," and for mandatory cancellation for specified failures to advance the underlying action, pursuant to a stipulation, or upon final disposition of the underlying lawsuit. N.Y. C.P.L.R. 6514(a),(b),(d). An order cancelling a notice of pendency may direct the party who filed the notice "to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action." *Id.* 6514.[1] Section 6515 provides that in all actions (except those seeking mortgage foreclosures, partition, or dower), a property owner may move to substitute a bond for the notice of pendency if "adequate relief can be secured to the plaintiff." *Id.* 6515(1).

New York's notice of pendency has been described as an "extraordinary privilege," *Israelson v Bradley*, 308 N.Y. 511, 516, 127 N.E.2d 313, 315 (1955), and a "unique provisional remedy," In *re Sakow*, 97 N.Y.2d at 441, 767 N.E.2d at 670, principally because it may be filed without advance notice or prior judicial review, and does not depend upon a showing that the plaintiff is likely to prevail

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[1] A property owner who seeks damages for misuse of a notice of pendency may also bring an action for malicious prosecution or abuse of process. 13 Weinstein, New York Civil Practice: CPLR ¶ 6514.11, at 65-71.

on the merits. See *id.* Accordingly, Article 65 is narrowly interpreted by New York courts, both as to its procedural requirements and as to its substantive application. *See 5303 Realty Corp.*, 64 N.Y.2d at 320-21, 476 N.E.2d at 281. The many uses of the notice are set forth in the margin.[2] Although a court must uphold a notice of pendency if the underlying complaint sets forth a claim within the scope of C.P.L.R. 6501, the court may evaluate the claim's legal sufficiency and, if facially insufficient, the court should cancel the notice. See 13 Weinstein, *New York Civil Practice: CPLR* ¶ 6501.05, at 65-11; *Gallagher Removal Serv., Inc. v. Duchnowski*, 179 A.D.2d 622, 623, 578 N.Y.S.2d 584, 585 (App. Div. 1992) (cancelling notice of pendency based on an expired option to purchase property).

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[2] A notice of pendency is mandatory in an action to foreclose a mortgage or to quiet title. See 13 Weinstein, *New York Civil Practice: CPLR* ¶ 6501.06, at 65-13. Filing of a notice of pendency has been found proper in the following types of actions: partition, ejectment, dower, specific performance of a contract to convey an interest in real property, to impress a lien upon real property, to compel the reconveyance of an interest in specific real property, to rescind a referee's deed, to establish and enforce a mechanic's lien on real property, to establish the plaintiff's undivided interest in real property, to foreclose a vendee's or vendor's lien, to convert a purported deed into a mortgage, to set aside a fraudulent conveyance, to enjoin violation of a zoning ordinance, to enforce an easement, to void an agreement creating an easement, in a stockholder's derivative suit to compel the reconveyance of real property to the corporation, to impress a constructive trust on real property, and for an accounting. *See id.* ¶ 6501.06, at 65-13-17.

II

Jehed Diamond, Oscar Diaz and Joseph Betesh each brought an action challenging New York's notice of pendency statute principally on due process grounds. The Diamond and Betesh lawsuits were consolidated in the district court, and their appeal from the dismissal of the consolidated action was heard in tandem with the appeal from the dismissal of the Diaz action. Unless otherwise indicated, the following facts are taken from the three complaints and supporting documents, which we assume to be true in reviewing a Federal Rule of Civil Procedure 12(b)(6) dismissal. *Reddington v. Staten Island Univ. Hosp.*, 511 F.3d 126, 128 (2d Cir. 2007).

Diamond. Jehed Diamond and her husband together purchased a home in Delaware County, New York. Although title was in the husband's name, the couple intended to hold the property jointly as marital property pursuant to New York's domestic relations laws. In May 2002, Diamond learned that her husband had secretly dissipated marital assets to fuel a gambling addiction. Diamond immediately demanded that her husband yield title to the marital home, which was the only asset remaining from the marriage. On May 17, 2002, her husband conveyed the deed to Diamond, who was a bona fide purchaser for fair consideration.

Diamond contracted with a buyer for the property in July 2002. Around the same time, Diamond learned that her husband had obtained a series of personal loans from several individuals,

including their neighbor Christopher Jones. On October 1, 2002, approximately six weeks before the scheduled closing, Jones filed a lawsuit and a notice of pendency in Delaware County pursuant to N.Y. C.P.L.R. 6501, alleging that over the prior year he had loaned $90,000 to Diamond's husband in reliance on his verbal promise to repay out of the proceeds from the eventual sale of the house, and that the May 2002 transfer of the property to Diamond was a fraudulent conveyance intended to evade repayment of the loan (although Jones did not allege that Diamond knew of the debt at the time). Jones' complaint attached a promissory note evidencing the debt.

Diamond filed an order to show cause in state court, seeking to vacate the notice, and the state court set a hearing for the day before the closing. In order to induce Jones to lift the notice of pendency in time to allow Diamond to complete the sale of the property, Diamond agreed to place $100,000 from the sale of the property in escrow pending the outcome of Jones' lawsuit. Accordingly, the notice of pendency was cancelled, and the sale closed on schedule. Diamond's federal complaint alleges, however, that the adverse effect of the notice was perpetuated in the ensuing litigation between Diamond and Jones over the escrow agreement. As the record on appeal arguably reflects, Diamond's constitutional and other defenses were rejected by the state court; the escrow agreement weakened Diamond's leverage in settlement negotiations; and she ended up paying Jones most of the money in escrow.

In June 2003, Diamond filed a complaint (the first of the three class action complaints at issue here), asserting claims under 42 U.S.C. § 1983 on the ground that Article 65 permits the deprivation of property without due process, and illegally discriminates against married persons who are creditors of their spouses by depriving them of access to lis pendens procedures available to non-spousal creditors. The complaint also alleged violations of Diamond's New York state constitutional rights to due process and equal protection. The complaint named as defendants New York's governor, attorney general and comptroller (individually and in their official capacities), the Delaware County Clerk in his official capacity, and Mr. Jones. Diamond sought preliminary and permanent injunctive relief, declaratory relief, actual and punitive damages, and costs and fees.

Diaz. In 2003, after Oscar Diaz fell behind in payments on his home mortgage, Churchill Mortgage Investment Corporation foreclosed and filed a notice of pendency in Bronx County. Diaz alleges in his complaint that he had various predatory lending defenses and state law claims of deceptive practices.

In December 2003, Diaz (represented by the same counsel as Diamond), filed a federal putative class action complaint that was referred as a related case to Judge Stein. The Diaz complaint alleged federal due process and equal protection violations, seeking the same relief as Diamond (but did not assert state law claims). The complaint named the same state defendants, the Bronx County Clerk, and

Churchill. In March 2005, Diaz's counsel advised the district court that a sale had been negotiated to pay off the mortgage, and that the state foreclosure action would be dismissed and the notice of pendency cancelled. Diaz continued to prosecute the federal action, on the theory that the notice of pendency compelled him to sell his home at a price below market.

Betesh. In 1996, Joseph Betesh exercised a power of attorney granted by his mother to transfer to himself his mother's two-family house in East Elmhurst, New York. His mother died sometime later. In June 2004, the house was damaged by fire and rendered largely uninhabitable. In August 2004, Betesh signed a $60,000 loan commitment for a home equity loan at a New York City-subsidized interest rate. On August 12, 2004, Betesh's brother filed a lawsuit and notice of pendency in Queens County alleging that the 1996 transfer had been improper because the power of attorney was invalid. Betesh was soon informed that he could not receive the home equity loan because of the notice of pendency.

In October 2004, Betesh, acting pro se, filed an order to show cause in state court to dismiss his brother's action and to revoke the notice of pendency; but relief was denied on procedural grounds. Betesh then retained a lawyer, who moved to dismiss the state court action and vacate the notice on state law grounds, including that the suit was time-barred. That motion was pending when, in May 2005, Betesh filed his federal putative class-action complaint, alleging the same federal due process claim made in

the Diamond and Diaz complaints, but not alleging equal protection or state law claims. The complaint named the same state defendants, the Queens County Clerk, and Betesh's brother. Betesh sought the same relief as the other plaintiffs. He seeks damages on the theory that he lost rent because the notice of pendency interfered with the repair of the house.

After the federal complaint was filed, the state court action against Betesh was dismissed, and the notice of pendency was ultimately cancelled.

III

The first of the federal complaints was filed by Diamond in June 2003, and was dismissed in September 2003 under the *Rooker-Feldman* doctrine, on the ground that Diamond was seeking review of the state court judgments concerning the same constitutional issues. *The District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). While Diamond's appeal was pending, the same counsel filed the Diaz action, which elided the *Rooker-Feldman* objection because Diaz had not litigated the constitutional issues in state court. The Diaz action was assigned to the same judge as a related case. In March 2005, counsel advised the court that Diaz had arranged to sell his home and to remove the notice of pendency, developments that would render moot the request for injunctive relief. In order to preserve a claim for injunction, counsel identified Betesh as a

potentially suitable plaintiff, and moved on his behalf to intervene in the Diaz action.[3]

Betesh's motion was never decided because in April 2005 the district court dismissed the Diaz complaint under Rule 12(b)(6). See *Diaz v. Pataki*, 368 F. Supp. 2d 265 (S.D.N.Y. 2005). The court held that: (1) Diaz's claim for injunctive relief was mooted by the sale of the property, *id.* at 269-70; (2) the claim for money damages against state officials failed because there was no allegation of personal involvement and because the Eleventh Amendment bars such relief against government defendants, *id.* at 270-71; (3) Diaz's claim for declaratory relief on equal protection grounds failed because Article 65 is not discriminatory on its face and because there was no allegation of illegal discrimination in connection with the application of the statute in Diaz's case, *id.* at 272; (4) the facial challenge to the statute failed because Diaz did not allege facts showing there exists no set of circumstances under which the statute would be valid, *id.* at 274-75; and (5) Diaz's as-applied challenge failed under the three-part analysis set forth in *Connecticut v. Doehr*, 501 U.S.

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[3] 3 As noted above, the lis pendens notices in all three underlying actions ultimately were cancelled, rendering moot plaintiffs' claims in federal court for injunctive relief. However, these appeals are not moot insofar as plaintiffs seek damages. *See Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 150-51 (2d Cir. 2006). Because we uphold the constitutionality of the New York statute, we do not need to consider whether the moot claims for injunctive relief were nonetheless justiciable under the exception for harms that are "capable of repetition, yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam) (internal quotation marks omitted).

1, 11 (1991), *id.* at 276-78. Betesh thereafter filed his separate class-action complaint.

In July 2005, Diamond's appeal was resolved by a remand after the Supreme Court decided *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), which rendered the *Rooker-Feldman* doctrine plainly inapplicable to Diamond's case. Diaz was allowed to withdraw his appeal of the dismissal order without prejudice to reactivation after a final decision in the Diamond and Betesh cases.

In August 2006, the district court consolidated the Diamond and Betesh cases, and denied a motion for class certification on the ground that the proposed class representatives did not have claims or defenses "typical of the claims or defenses of the class." *See* Fed. R. Civ. P. 23(a)(3). In February 2007, the district court dismissed the Diamond/Betesh action under Rule 12(b)(6), for essentially the same reasons as set forth in its Diaz opinion. *See Diamond v. Pataki*, No. 03 Civ. 4642, 2007 WL 485962 (S.D.N.Y. Feb. 14, 2007).

The Diamond/Betesh appeal is now heard in tandem with the reactivated Diaz appeal. Five issues are presented: (1) whether New York's lis pendens statute violates due process, on its face or as applied, by failing to provide notice and an opportunity to be heard; (2) whether the statute unconstitutionally discriminates against women in violation of equal protection; (3) whether the statute violates the fundamental right of access to the courts; (4) whether state officials involved in the operation of the lis pendens law are entitled to qualified

immunity; and (5) whether to certify a putative plaintiff class of property owners subject to the law and a putative defendant class of all county clerks. We decide the first two questions, and hold that Article 65 does not offend either federal due process or equal protection guarantees. We do not consider whether Article 65 obstructs access to the courts because this issue is raised for the first time on appeal. *See Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006). Because we affirm the dismissal of the complaints, we do not reach the issues of qualified immunity or class certification.

IV

The grant of a motion to dismiss is reviewed de novo. *See Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003).

A. Due Process

"Parties whose rights are to be affected" are entitled to "notice and an opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (internal quotation marks omitted). Evaluation of due process challenges to statutes affecting property interests traditionally has required a two-part analysis: (1) does the statute authorize the deprivation of a "significant property interest" protected by the Fifth Amendment, *id.* at 86; and (2) if so, what process is due in the particular circumstances, *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). *See also Ford Motor Credit Co. v. NYC Police Dep't*, 503 F.3d 186, 190 (2d Cir. 2007).

As to the first inquiry, defendants argue that the filing of a notice of pendency does not trigger due process scrutiny because it does not deprive plaintiffs of property: a notice of pendency creates no property right in another party and merely prevents the seller from withholding the fact that there are adverse claims to the realty; it is the underlying lawsuit that potentially affects the owner's property interest. Defendants principally rely on criminal forfeiture cases that, in dicta, deem lis pendens a "less restrictive" alternative to the ex parte seizures of property that violate due process. *See, e.g., United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 62 (1993); *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1265 (2d Cir. 1989) (same); cf. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 15 (1984) ("It is certainly possible . . . that the initiation of condemnation proceedings, publicized by the filing of a notice of lis pendens, reduced the price that the land would have fetched, but impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking.").

The cited cases (which in any event do not involve a direct challenge to a lis pendens statute) must be read in light of *Doehr*, which held that due process concerns may be triggered by something less than "a complete, physical, or16 permanent deprivation of real property." *Doehr*, 501 U.S. at 12. "[E]ven the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *Id.*

A notice of pendency is arguably such a "similar encumbrance"--though two circuit courts have ruled otherwise.[4] In any event, we need not decide whether a lis pendens effects a "significant taking of property," *Fuentes*, 407 U.S. at 86, because we conclude, in deciding what process would be due, that New York's lis pendens statute provides all the process that is due in respect of the claimed property interests at stake. In so holding, we rely on the framework set forth in *Doehr* for analyzing due process objections to prejudgment remedies.

Doehr, a challenge to Connecticut's prejudgment attachment statute, arose from an assault and battery tort claim. The victim sued

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[4] See *United States v. Register*, 182 F.3d 820, 837(11th Cir. 1999) ("[A] filing of a lis pendens pursuant to state statute does not constitute a 'seizure' and does not affect property interests to an extent significant enough to implicate the Due Process Clause of the Fifth Amendment."); *Aronson v. City of Akron*, 116 F.3d 804, 811 (6th Cir. 1997) ("In addition to impairing the owner's ability to sell his interest in the property, a lis pendens [like the corrupt activity lien under consideration, which does not 'constitute a seizure of property in the ordinary sense of that term'] . . . may taint the owner's credit rating, may place an existing mortgage in technical default, may make it impossible to obtain a second mortgage, and may have other adverse consequences. But . . . *this would not trigger the notice and hearing requirement*." (emphasis added) (internal quotation marks omitted)); cf. *United States v. Jarvis*, 499 F.3d 1196, 1203 (10th Cir. 2007) ("The [lis pendens] notice is intended to preserve the property rights in existence at the time the litigation commences, but does not create new or additional property rights."). A district court in this Circuit decided pre-*Doehr* that a lis pendens is not "a taking for due process purposes." See *United States v. Rivieccio*, 661 F. Supp. 281, 297 (E.D.N.Y. 1987).

Doehr, the alleged assailant, and filed a $75,000 notice of attachment on Doehr's home as security for any judgment. *See Doehr*, 501 U.S. at 5. At the time, Connecticut law authorized prejudgment attachment of real estate without affording the owner notice or prior hearing or bond, as long as the plaintiff in the underlying suit, or "some competent affiant," verified that there is probable cause to sustain the plaintiff's claims. *Id.* at 5 (internal quotation marks omitted). The attachment effected a seizure of the property, impairing Doehr's ability to sell or encumber it, although not preventing continued use and enjoyment. Only after the sheriff attached the property did Doehr receive service of the complaint in the underlying action, and the notice of attachment. *Id.* at 7. Doehr argued that the statute as applied to him violated due process, and the Supreme Court agreed. *Id.* at 13-18.

To ascertain whether and what process was due, the *Doehr* Court adapted the *Mathews* balancing test (employed in cases of government deprivation of property), to govern private disputes in which one party enlists the state to assert prejudgment control over the other party's property. *Doehr*, 501 U.S. at 10. The *Doehr* test examines three factors:

> first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, . . . principal attention to the interest of

> the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.

Id. at 11.

Applying that test, the Court first found significant impact on Doehr's private interest: tainted credit rating, clouded title, and impaired ability to alienate the property. *Id.*

Second, as to the risk of erroneous deprivation, the "probable cause" standard for obtaining an attachment order was deemed "one-sided, self-serving, and conclusory." *Id.* at 14. Because probable cause required only a facially valid complaint, the statute allowed "deprivation of the defendant's property when the claim would fail to convince a jury[or] when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute." *Id.* at 13-14. The likelihood of error was heightened in the context of intentional tort actions seeking indefinite damages, and insufficiently mitigated by the availability of a post-attachment adversarial hearing. *Id.* at 14-15.

Third, the Court concluded that the interests of the tort plaintiff in the *ex parte* attachment of the house were "minimal" because the assault and battery claim bore no relation to the real property, and the "plaintiff had no existing interest in Doehr's real estate when he sought the attachment." *Id.* at

16. The Court considered that no "exigent circumstance" had been identified, such as a claim that Doehr was about to take steps that would render his property unavailable to satisfy a judgment, *id.*; that Connecticut was one of only three states to authorize attachment "in situations that do not involve any purportedly heightened threat to the plaintiff's interest," *id.* at 18; and that "accurate ex parte assessments of the merits," which are feasible in commercial disputes, are hard to make when the claim sounds in tort, *id.* at 17. Because all three Doehr factors raised substantial due process concerns, the Court concluded that the statute was unconstitutional as applied in that case.[5]

Chief Justice Rehnquist filed a concurrence to emphasize that the Court's holding did not disturb settled law upholding the constitutionality of prejudgment remedies where the plaintiff had a pre-existing interest in the property, such as a mechanic's lien or a lis pendens. *See Doehr*, 510 U.S. at 27-29 (Rehnquist, C.J., concurring) (citing *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997, 999 (D. Ariz. 1973), *aff'd by* 417 U.S. 901 (1974), and *Bartlett v. Williams*, 464 U.S. 801 (1983) (dismissing *Williams v. Barlett*, 189 Conn. 471, 457 A.2d 290 (1983), "for want of a substantial federal question")).

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[5] A four-member plurality also reached the nonprecedential conclusion that the absence of a bond requirement in the Connecticut statute violated due process. See Doehr, 501 U.S. at 18-23 (White, J., concurring).

This Circuit has similarly interpreted the *Doehr* majority to have rested its due process holding on the application of Connecticut's statute to an intentional tortfeasor, as opposed to a creditor with an existing interest in the property. *See Shaumyan v. O'Neill*, 987 F.2d 122, 126-27 (2d Cir. 1993) (upholding the same Connecticut statute as applied to contractor's claim for payment of "an outstanding sum certain" for completed repairs to attached property); *cf. British Int'l Ins. Co. v. Seguros La Republica, S.A.*, 212 F.3d 138, 144 & n.3 (2d Cir. 2000) (per curiam) (stating in dicta that a claim for a contractually- defined sum "appears to fall into the category of cases cited in *Doehr* as 'lend[ing] themselves to accurate *ex parte* assessments of the merits'" (quoting *Doehr*, 501 U.S. at 17)).

In applying *Doehr* to this case, we consider the material distinctions between the Connecticut statute in *Doehr* and New York statute at issue here, and remain mindful that "[d]ue process is inevitably a fact-intensive inquiry." *Krimstock v. Kelly*, 306 F.3d 40, 51 (2d Cir. 2002).

1. The first *Doehr* consideration is the effect of the statutory imposition on the property owner's private interest. Lis pendens, unlike attachment is "a well- established, traditional remedy," the effect of which "is simply to give notice to the world of the remedy being sought in the lawsuit itself" and which "creates no additional right in the property on the part of the plaintiff." *Doehr*, 501 U.S. at 29 (Rehnquist, C.J., concurring); *see* 13 Weinstein, *New York Civil Practice: CPLR* ¶ 6501.11, at 65-24 (describing New York notice of pendency statute in

similar terms). Accordingly, the owner of property subject to a lis pendens continues to be able to inhabit and use the property, receive rental income from it, enjoy its privacy, and even alienate it. *See, e.g., Kirby Forest Indus., Inc.*, 467 U.S. at 15. For this reason, lis pendens is deemed one of the "less restrictive" means of protecting a disputed property interest. *See James Daniel Good Real Prop.*, 510 U.S. at 62; *4492 S. Livonia Rd.*, 889 10 F.2d at 1265. The impact of New York's lis pendens statute is further mitigated because it is available only in actions "in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property," N.Y. C.P.L.R. 6501--a standard that is strictly construed. *See 5303 Realty Corp.*, 64 N.Y.2d at 321, 476 N.E.2d at 281.

Nevertheless, plaintiffs allege that the marketability of their property was compromised before they were afforded an opportunity to contest the lis pendens. The following loss and detriment is claimed: Diaz sold his home only after some delay and compromise; Betesh could not get a construction loan; and Diamond, though she sold her property on schedule, suffered detriments arising out of the alternative security she had to provide. We decline to look behind these claims at this preliminary stage of proceedings.[6] We therefore conclude that the first

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[6] The validity of these claims is contestable: It is unclear why Diaz should have been able to delay notice to potential buyers that the property was subject to a mortgage lien and was in foreclosure, or why Betesh should have been able to delay disclosure of his brother's claim from the New York City-subsidized lender; and Diamond's only detriment was to pay part of the proceeds to discharge a debt she was found to owe.

Doehr factor supports plaintiffs' position, although not so decisively as in *Doehr*.

2. The second *Doehr* factor assesses the risk that a notice of pendency would be wrongfully filed under existing procedures, and the probable value of additional statutory safeguards. In *Doehr*, a substantial risk of error was created by the nature of the underlying claim: an intentional tort that had no connection to the property and did not "readily lend [itself] to accurate ex parte assessment[] of the merits." *Doehr*, 501 U.S. at 17. *See also Shaumyan*, 987 F.2d at 126 (reading *Doehr* to disapprove attachment procedure that "did not protect the [property owner] against the uncertainties that are associated with intentional tort cases").

By contrast, the risk of erroneous deprivation is minimal under the New York lis pendens procedure, which is available only to claimants asserting a defined interest in the property. The three lis pendens here were filed by creditors whose claims were pre-existing, readily quantifiable, and largely susceptible to proof by documentary evidence: Diamond's property was subject to a promissory note for a sum certain; Diaz's property was subject to a mortgage; Betesh's property was subject to a claim for half-ownership by a brother who contested the validity of the documents used to transfer the property to Betesh. Defenses notwithstanding, the underlying claims (unlike tort claims) involved relatively "'uncomplicated matters that lend themselves to documentary proof.'" *Doehr*, 501 U.S. at 14 (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609 (1974) (upholding ex parte

sequestration based on vendor's lien that could be determined on the documentary record)).

The risk of error was further reduced by Article 65's procedural safeguards. Plaintiffs contend that the statute does not protect the property owner by notice and a sufficient opportunity to challenge the lis pendens, or by the posting of bond. As to notice, the statute requires service of a summons within 30 days after filing a lis pendens in order to preserve it, thus apprising the property owner of a claim against the property. *See* N.Y. C.P.L.R. 6512. As to opportunity to be heard, the statute provides for a hearing to challenge the lis pendens, and for cancellation of the lis pendens upon a showing that the plaintiff in the underlying lawsuit "has not commenced or prosecuted the action in good faith." *Id.* 6514(b); *see, e.g., Josefsson v. Keller*, 141 A.D.2d 700, 701, 530 N.Y.S.2d 10, 11 (App. Div. 1988). Notice and hearing are afforded post-deprivation; but such procedural safeguards suffice where "the nature of the issues at stake minimizes the risk" of wrongful deprivation. *Mitchell*, 416 U.S. at 609-10; *see also Shaumyan*, 987 F.2d at 127 (upholding procedural safeguards "similar to those in the statute that was upheld in *Mitchell*").

The scope of a court's review when asked to cancel a notice of pendency pursuant to C.P.L.R. 6514(b) appears to have once been unclear. In 1983, one lower court in New York held that due process required consideration of the merits of the underlying action. *Hercules Chem. Co. v. VCI, Inc.*, 118 Misc. 2d 814, 826, 462 N.Y.S.2d 129, 137 (Sup. Ct.1983). But the New York Court of Appeals

subsequently held that "the court's scope of review" when considering whether to cancel a notice of pendency pursuant to C.P.L.R. 6514(b) "is circumscribed," so that "likelihood of success on the merits is irrelevant . . . ." *5303 Realty Corp.*, 64 N.Y.2d at 320, 476 N.E.2d at 280.

Some other states have enacted lis pendens statutes that require more than a showing of good faith. For example, Connecticut requires that the filer of the notice "establish that there is probable cause to sustain the validity of his claim," Conn. Gen. Stat. 52-325b(a); New Jersey requires the showing of "a probability that final judgment will be entered in favor of the plaintiff," N.J.Stat. Ann. 2A-15-7(b); and Nevada requires that the party who seeks a notice of pendency must show that he is "likely to prevail" in the underlying suit. Nev. Rev. Stat. Ann. 14.015.[7] The Supreme Court has noted the danger of allowing the issuance of an attachment without a sufficient examination of the merits of the underlying suit:

> Permitting a court to authorize attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations

[7] The plaintiffs advise that legislation is currently pending in the New York State Legislature which would "expand the grounds on which to vacate" a notice of pendency in some unspecified fashion.

> that were sufficient to state a cause of action but which the defendant would dispute, or in the case of a mere good-faith standard, even when the complaint failed to state a claim upon which relief could be granted.

Doehr, 501 U.S. at 13-14 (emphasis added). This statement is dicta, however; and we cannot say that C.P.L.R. 6514(b)'s employment of "a mere good-faith standard" constitutes a violation of due process. At the same time, this standard does not afford the most meaningful process to a property holder burdened by a notice of pendency filed in conjunction with a patently meritless law suit.

We similarly reject plaintiffs' assertion that the statute's procedure for substituting a bond is defective. *See* N.Y. C.P.L.R. 6515. Plaintiffs argue that due process requires that the notice filer also post a bond in every case. However, only a plurality of the Court in *Doehr* reached the issue of the significance of a bond requirement, *see* 501 U.S. at 18-23 (White, J., concurring), and this Circuit "has continued to adhere to our previously established position that a security bond need not be posted in connection with a prejudgment attachment in order to satisfy the requirements of due process." *Result Shipping Co. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 402 (2d Cir. 1995). On the whole, the second *Doehr* factor weighs in favor of upholding the constitutionality of Article 65.

3. The last *Doehr* factor considers the interest of the claimant and the state. *Doehr*, 501 U.S. at 11. The *Doehr* Court discounted the interest of a claimant who had no pre- existing stake in the

attached property and no asserted basis for fearing that the attached property might become unavailable during the pendency of the underlying lawsuit. *Id.* at 16. By contrast, lis pendens in New York is available only to secure claims of existing interests in the realty at issue. *See Mitchell*, 416 U.S. at 604 (observing that when the property owner and the creditor both have "current, real interests in the property, . . . [r]esolution of the due process question must take account not only of the interests of the [owner] of the property but those of the [creditor] as well"). The claimant's interest carries more weight here than in *Doehr*.[8]

Likewise, New York has greater interest in the prejudgment remedy than Connecticut had in *Doehr*. By securing the unique property that is the subject matter of the litigation, the New York lis pendens procedure protects the court's power over the disposition of that property. *See 5303 Realty Corp.*, 64 N.Y.2d at 319, 476 N.E.2d at 280. Without lis pendens, actions such as those brought against plaintiffs here could be frustrated by transfer or encumbrance of the property in favor of an innocent third party who lacked notice. "If the power of the

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[8] Moreover, in two of the underlying actions, the notice of pendency was filed after the property owner attempted to transfer or encumber the property. Diamond had already entered a contract for sale of her property, and Betesh had applied for a home equity loan, when notices of pendency were filed to preserve the property. The prospect of imminent alienation of the property at stake in the underlying lawsuit "would be an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected." *Doehr*, 501 U.S. at 16.

courts to determine the rights of the parties to real property could be defeated by its transfer, pendente lite, to a purchaser without notice, additional litigation would be spawned and the public's confidence in the judicial process could be undermined." *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1329 (3d Cir. 1982). Taken together, the interests of the claimant and the state in the availability of the lis pendens remedy are substantial, and weigh in favor of the constitutionality of the statute.

We conclude, as to all of the plaintiffs, that their property interest as affected by the lis pendens carries some weight, but it is outweighed by the remaining considerations. In view of the procedural safeguards of Article 65--in particular its narrow application to pre-existing claims affecting the property, and its provisions for post-deprivation notice and hearing--the statute satisfies the Due Process Clause of the Fourteenth Amendment.

Because plaintiffs have failed to plead facts establishing that Article 65 is unconstitutional as applied to them, they necessarily fail to state a facial challenge, which requires them to "'establish that no set of circumstances exists under which the [statute] would be valid.'" *Cranley v. Nat'l Life Ins. Co. of Vermont*, 318 F.3d 105, 110 (2d Cir. 2003) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); see also Shaumyan, 987 F.2d at 126 (following Doehr in conducting only an as- applied analysis of the statute). Therefore, we affirm the district court's dismissal of the due process claims.

B. Equal Protection

Plaintiffs argue that New York's lis pendens law violates the Equal Protection Clause of the Fourteenth Amendment because it "discriminates against married persons who are creditors of their spouses by depriving them of the protections, rights, and remedies granted non-spousal creditors without any rational basis." (Diamond Compl. ¶ 68.) Plaintiffs assert this claim on behalf of Diamond alone, alleging that she, "as a creditor of [her husband] stands in a disadvantaged position vis a vis Jones" because Jones "was able to place a lis pendens on the marital residence" whereas Diamond could not. (Diamond Compl. ¶ 56.)[9]

Article 65 is facially neutral: it does not refer to marital status or distinguish in any way between spousal and non-spousal creditors; it does not stop one spouse from using the procedure against the other; and it does not exclude marital property. A facially neutral statute violates equal protection only if it "has been applied in an intentionally discriminatory manner" or "has an adverse effect and . . . was motivated by discriminatory animus." *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000); *see also Harris v. McRae*, 448 U.S. 297, 323 n.26 (1980) ("[W]hen a facially neutral . . . statute is challenged on equal protection grounds, it is incumbent upon the challenger to prove that

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[9] Diaz asserted an equal protection claim, but it was abandoned on appeal; we therefore do not review the district court's dismissal of that count. *See LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995).

Congress selected or reaffirmed a particular course of action at least in part 'because of,' not merely in 'spite of,' its adverse effects upon an identifiable group." (internal quotation marks omitted)).

Diamond's complaint does not allege intentional discrimination in the application or effect of Article 65. Accordingly, the district court held that she failed adequately to plead an equal protection claim. *See Diamond v. Pataki*, No. 03 Civ. 4642, 2007 WL 485962, at *6 (S.D.N.Y. Feb. 14, 2007).

On appeal, Diamond argues that the statute has been interpreted by New York courts to bar a spouse-creditor (such as Diamond) from placing a lis pendens on the marital residence. Diamond cites New York matrimonial cases holding that a spouse is not entitled to file a lis pendens in order to secure equitable distribution of property. *See, e.g., Fakiris v. Fakiris*, 177 A.D.2d 540, 543, 575 N.Y.S.2d 924, 927 (App. Div. 1991); *Gross v. Gross*, 114 A.D.2d 1002, 1003, 495 N.Y.S.2d 441, 443 (App. Div. 1985).

The cases cited by Diamond stand only for the proposition that under New York law, a claim for equitable distribution does not seek a judgment that affects the property in a manner contemplated by Article 65. *See Gross*, 114 A.D.2d at 1003, 495 N.Y.S.2d at 443 ("The fact that plaintiff may be entitled to an equitable distribution with regard to the residence does not give rise to [the extraordinary] privilege [of filing of a notice of pendency]."); *Fakiris*, 177 A.D.2d at 543, 575 N.Y.S.2d at 927 (citing *Gross* for same); *see also Sehgal v. Seghal*, 220 A.D.2d 201, 201, 631 N.Y.S.2d

360, 361 (App. Div. 1995) ("A claim that real property is a marital asset subject to distribution does not, by itself, establish grounds for a lis pendens."). The "narrow application" of Article 65, 5303 Realty Corp., 64 N.Y.2d at 315, 476 N.E.2d at 278, and not any discriminatory intent, is the reason lis pendens is unavailable in connection with a claim for equitable distribution.

Furthermore, it is well-settled under New York law that spouses may avail themselves of Article 65 to file notices of pendency against each other--in those cases that "would affect the title to, or the possession, use or enjoyment of, real property," N.Y. C.P.L.R. 6501. *See, e.g., Caruso, Caruso & Branda, P.C. v. Hirsch*, 41 A.D.3d 407, 409, 837 N.Y.S.2d 734, 736 (App. Div. 2007) (noting availability of lis pendens in divorce action where one spouse alleged fraudulent conveyance and sought imposition of a constructive trust against the other's property); *Elghanayan v. Elghanayan*, 102 A.D.2d 803, 804, 477 N.Y.S.2d 163, 163-64 (App. Div. 1984) (same); *Bennett v. Bennett*, 62 A.D.2d 1154, 1154-55, 404 N.Y.S.2d 171, 172-73 (App. Div. 1978) (lis pendens available in former wife's action to set aside ex- husband's conveyance of his share in realty that they had previously owned by the entirety); *Ventura v. Ventura*, 27 Misc. 2d 338, 339, 211 N.Y.S.2d 227, 228 (Sup. Ct. 1960) (lis pendens available in spouse's action to impose equitable lien).

Diamond never brought the type of action against her husband that would have entitled her to file a notice of pendency; Jones did. Thus the disparity between the remedies at their disposal was

not the result of statutory discrimination, but of the parties' claims and litigation choices.

As Article 65 poses no bar--on its face or in its operation--to spousal lis pendens in claims cognizable under the statute, we affirm the district court's dismissal of the equal protection claim.

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

03 Civ. 4642 (SHS)
OPINION & ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JEHED DIAMOND, on behalf of herself and all others similarly situated,

Plaintiffs,

-against-

GEORGE E. PATAKI, individually and in his official capacity as Governor of the State of New York; ELIOT SPITZER, individually and in his official capacity as Attorney General of the State of New York; ALAN G. HEVESI, individually and in his official capacity as Comptroller of the State of New York; GARY L. CADY, in his official capacity as Clerk of Delaware County, and on behalf of a defendant class of New York County Clerks, CHRISTOPHER JONES,

Defendants.

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JOSEPH BETESH, on behalf of himself and all others similarly situated,

Plaintiffs,

-against-

GEORGE E. PATAKI, individually and in his official capacity as Governor of the State of New York, ELIOT SPITZER, individually and in his official capacity as Attorney General of the State of New York, ALAN HEVESI, individually and in his official capacity as Comptroller of the State of New York, GLORIA D'AMICO, individually and in her official capacity as Clerk of the County of Queens, and on behalf of a defendant class of New York County Clerks, and ABRAHAM BETESH,

Defendants.

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SIDNEY H. STEIN, U.S. District Judge.

The named plaintiffs in these consolidated actions – Jehed Diamond and Joseph Betesh –allege violations of the Fifth and Fourteenth Amendments to the United States Constitution pursuant to 42 U.S.C. § 1983. They each contend that New York State's lis pendens statute, N.Y. C.P.L.R. §§ 6501-6515, violates their constitutional right to due process, both on its face and as applied to each plaintiff. In addition, Diamond contends that the lis pendens statute violates both her equal protection rights as a married person and her New York state

constitutional rights to due process and equal protection pursuant to the New York State Constitution.

Diamond and Betesh originally brought their claims against the then New York State Governor George E. Pataki, Attorney General Elliot Spitzer, and Comptroller Alan Hevesi.[10] Diamond also brings her claims against Gary L. Cady – the Delaware County Clerk – and Christopher Jones – the individual who filed the notice of pendency with the Delaware County Clerk's office. Similarly, Betesh also brings his claims against Gloria D'Amico – the Queens County Clerk – and Abraham Betesh – the individual who filed the notice of pendency with the Queens County Clerk's office. All defendants except Christopher Jones and Abraham Betesh are referred to collectively as "the State Defendants."

In *Diaz v. Pataki*, 368 F. Supp. 2d 265 (S.D.N.Y. 2005), this Court upheld the constitutionality of the same statute at issue here in the face of essentially the same claims. The New York State defendants in these consolidated actions have now moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaints for failure to state a claim. Because nothing about Diamond and Betesh's due process claims justifies a result different than that in

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[10] Fed. R. Civ. P. 25(d)(1) provides when a public officer is a party to an action in an official capacity and ceases to hold office, the officer's successor will be substituted as a party. The caption therefore will henceforth be changed to reflect the fact that Eliot Spitzer is now the Governor, Andrew M. Cuomo is now the Attorney General, and Thomas P. DiNapoli is now the Comptroller.

Diaz, defendants' motions are granted with respect to all due process claims. Because Diamond does not bring valid equal protection or state constitutional claims, the defendants' motion is also granted with respect to those remaining claims.

I. Background

The following facts are taken from the complaints and are assumed to be true for the purposes of this motion. See *McKenna v. Wright*, 386 F.3d 432, 434 (2d Cir. 2004) (citing *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 250 (2d Cir. 2001)); *Diaz*, 368 F. Supp. 2d at 269.

A. *Facts Alleged in the Diamond Complaint*

In 1987, plaintiff Diamond and her husband, Michael Mendelson, jointly purchased real property on Ridge Road in Delaware County, New York. (Diamond Compl. ¶ 30.) Although the title to the property was in Mendelson's name, the property was purchased with joint assets, and the couple's intent was to hold it as joint property pursuant to New York's domestic relations laws. (*Id.* ¶ 31.) At some unspecified point after the property was purchased, Diamond and Mendelson legally separated. (*Id.* ¶ 30.)

On May 17, 2002, Mendelson conveyed the title and deed of the Ridge Road property to Diamond, who was a bona fide purchaser for fair consideration. (*Id.* ¶ 32.) This transfer of title took place almost immediately after Diamond learned for the first time that her husband had, four days earlier, secretly dissipated all the marital assets

including assets from their joint law practice. (*Id.* ¶ 33.) Diamond later learned that Mendleson had secretly obtained a $75,000 mortgage on the property (*id.* ¶ 34), and had additionally obtained a series of personal loans from several individuals, including defendant Christopher Jones. (*Id.* ¶¶ 41-42.) Unable to afford to keep the Ridge Road property, Diamond arranged to sell the property and scheduled a closing for November 13, 2002. (*Id.* ¶ 44.) However, two weeks prior to the scheduled closing, Jones filed a state lawsuit against both Mendelson and Diamond, as well as a notice of pendency with the Delaware County Clerk's office. (*Id.* ¶ 45.) Jones alleged in that state litigation that he loaned $90,000 to Mendelson in reliance upon Mendelsen's promise to repay the loan out of the proceeds from the prospective sale of the Ridge Road property, and that Mendelson had signed a promissory note specifying the terms of the loan. (Diamond Compl. at Ex. B.)

In order to be able to sell the property, Diamond signed an escrow agreement with Jones one week prior to the scheduled closing in which she agreed to forgo state court remedies against Jones and also placed $100,000 from the sale of the property in escrow pending the outcome of Jones' lawsuit against Mendelson and Diamond. (*Id.* ¶ 52.) Diamond asserts that the lis pendens on the Ridge Road property "continues to date through the successor escrow agreement," thereby continuing to deprive her of substantial assets. (*Id.* ¶ 59.) In June 2003, plaintiff Diamond filed one of these consolidated actions in federal court challenging the

constitutionality of the New York lis pendens statute.

B. *Facts Alleged in the Betesh Complaint*

Plaintiff Joseph Betesh owns a two-family home located in East Elmhurst, New York. (Betesh Compl. ¶ 33.) Betesh's home had originally been owned by his mother, who purchased it for the benefit of Betesh with the intention of gifting it to him. (*Id.* ¶ 34). After the initial purchase, Betesh resided in the second floor apartment of the home, and rented out the first floor apartment to a tenant. (*Id.* ¶ 33.) On December 23, 1996, Betesh's mother transferred the home to Betesh, and that transfer was effectuated by him with the consent of his mother using a power of attorney that had been executed by his mother. (*Id.* ¶ 35.) At some unspecified point in time after the transfer, Betesh's mother passed away. (See *id.* ¶ 42.)

On June 16, 2004, a fire in the house caused approximately $87,000 in damages. (*Id.* ¶ 36.) Because the house was uninsured, Betesh was unable to make the necessary repairs. (*Id.* ¶ 37.) As a result, the tenant in the first floor apartment discontinued paying rent in July 2004. (*Id.*) In August 2004, Betesh signed a loan commitment offered by a housing program affiliated with the New York City Department of Housing and Urban Development for a $60,000 home equity loan at a favorable interest rate. (*Id.* ¶ 38.)

On August 12, 2004, Joseph Betesh was served with a lawsuit filed by his brother, Abraham

Betesh, in New York Supreme Court, Queens County, claiming that Joseph Betesh had acted under an invalid power of attorney and had improperly transferred the residence from their mother to himself in 1996. (*Id.* ¶ 39.) The complaint did not refer to the fact that Betesh's brother had also filed a notice of pendency in conjunction with the action. (*Id.*) In late August 2004, Betesh received a phone call from the program that had offered him the home equity loan informing him that they could no longer offer the loan because of the notice of pendency on the property. (*Id.* ¶ 40.) In March 2005, Betesh filed a motion in the state action to dismiss his brother's state court action and to vacate the notice of pendency on state law grounds. (*Id.* ¶ 44.) In May 2005, plaintiff Betesh filed the present action in federal court challenging the constitutionality of the New York lis pendens statute.

C. *Facts Alleged Regarding the New York Statutory Scheme for Lis Pendens*

The Diamond and Betesh complaints each describe the lis pendens statutory scheme set forth in New York's Civil Practice Law and Rules. (Diamond Compl. ¶¶ 20-29; Betesh Compl. ¶¶ 21-32.) In Diaz v. Pataki, this Court described in some detail both the history of the lis pendens doctrine, as well as New York's statutory lis pendens procedure, including the various statutory provisions through which an aggrieved person may move to lift a notice of pendency or substitute a bond for that notice. See 368 F. Supp. 2d at 272-74. Familiarity with that Opinion is assumed.

As noted above, the State defendants have now moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaints for failure to state a claim. [11]

II. Discussion

A. *Legal Standard*

On a Rule 12(b)(6) motion the court must assess only the "legal feasibility of thecomplaint . . . ." *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998) (quoting *Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d Cir. 1984)). As set forth above, in deciding a motion to dismiss a complaint the Court must accept as true all of the plaintiff's factual allegations and draw all "reasonable inferences" in favor of the plaintiff. *Mason v. Amer. Tobacco Co.*, 346 F.3d 36, 39 (2d Cir. 2003). "On the other hand, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." *Id.* (internal quotation marks omitted); *see also Cooper*, 140 F.3d at 440 ("[B]ald assertions and conclusions of law are insufficient . . . ."). Ultimately, the Court may dismiss the plaintiff's complaint if "it appears beyond doubt that he can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 79 S.Ct. 99, 2 L.Ed. 2d 80 (1957); see also *Swierkiewicz v.*

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[11] Previously, plaintiffs moved for orders, inter alia: 1) certifying a plaintiff class of property owners; 2) certifying a defendant class of New York county clerks; and 3) granting a preliminary injunction enjoining enforcement of New York's lis pendens statute. Those motions were denied. *See* Order dated August 16, 2006.

Sorema, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed. 2d 1 (2002).

B. *Diamond and Betesh's Due Process Claims Should Be Dismissed*

In Diaz, this Court dismissed the plaintiff's facial challenge to New York's lis pendens statute because that plaintiff failed to allege facts showing that there exists no set of circumstances under which the statute would be valid. *See* 368 F. Supp. 2d at 274-75. Indeed, as noted in that Opinion, other courts have similarly held that the application of New York's lis pendens statute did not violate due process. *Id.* (citing *United States v. Premises Known As 281 Syosset Woodbury Road, Woodbury, New York*, 791 F. Supp. 61, 65 (E.D.N.Y. 1992); *United States v. Rivieccio*, 661 F. Supp. 281, 296-97 (E.D.N.Y. 1987)). For the reasons set forth in Diaz, Diamond and Betesh's facial challenges to the New York lis pendens statute are dismissed. As noted, plaintiffs not only claim New York's lis pendens statute on its face deprives them of due process of law but they also claim that as applied to them it violates due process. The latter due process challenge is analyzed pursuant to the three factors required by the Supreme Court's analysis in *Connecticut v. Doehr*: 1) consideration of the "private interest" affected by the filing of a lis pendens; 2) an examination of "the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards;" and 3) attention to "the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest

the government may have in providing the procedure or forgoing the added burden of providing greater protections." 501 U.S. 1, 11, 111 S.Ct. 2105, 115 L.Ed. 2d 1; *British Int'l Ins. Co. Ltd. v. Seguros La Republica*, 212 F.3d 138, 143 (2d Cir. 2000). Applying these three factors, this Court dismissed the similar as-applied challenge brought in *Diaz*. See 368 F. Supp. 2d at 277-78.

Here, plaintiffs attempt to distinguish their as-applied challenge by noting that whereas *Diaz* arose in the context of an underlying action in a mortgage foreclosure, the present underlying actions in each litigation do not. As an initial matter, the Court takes note that at least two other courts have upheld lis pendens statutes nearly identical to the statute in New York in cases in which the underlying lawsuit arose in a non-mortgage foreclosure context. See *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1317 (3d Cir. 1982) (plaintiff in underlying action filed notice of lis pendens in connection with its lawsuit alleging that defendant engaged in a fraudulent conspiracy to acquire certain assets without paying plaintiff the agreed upon consideration); *Williams v. Bartlett*, 189 Conn. 471, 473, 457 A.2d 290 (1983) (plaintiffs in underlying action filed notice of lis pendens in connection with lawsuit in which they claimed fraudulent misrepresentation and conveyance of real property), summarily aff'd, 464 U.S. 801, 104 S.Ct. 46, 78 L.Ed. 2d 67 (1983).

The Court now turns to the facts alleged in Diamond and Betesh's complaints in order to

analyze them pursuant to the three part constitutional balancing test.

1. *The Private Interest*

In Diaz, this Court considered the "private interest" asserted by the plaintiff and found that because "'[t]he lis pendens itself creates no additional right in the property on the part of the plaintiff [in the underlying suit], but simply allows third parties to know that a lawsuit is pending in which the plaintiff is seeking to establish such a right,' . . . the interest affected by the filing of a lis pendens is minimal." 368 F. Supp. 2d at 277 (*quoting Doehr*, 501 U.S. at 29, 111 S.Ct 2105, 115 L.Ed. 2d 1 (Rehnquist, C.J., concurring)). Here, Diamond and Betesh's private interests are identical to that of the plaintiff in *Diaz*, and accordingly, the Court finds that their private interests are also minimal.

2. *Risk of Erroneous Deprivation*

In Diaz, this Court found that the "the risk of erroneous deprivation is insubstantial" where the plaintiff fell behind in the mortgage payments and the mortgage company filed the lis pendens against his home in connection with its foreclosure action. 368 F. Supp. 2d at 277-78. Here, plaintiffs concede that in the context of an underlying mortgage foreclosure suit, "even if there are disputed issues, there will presumably always be at least 'probable cause' for the proceeding," but they assert that "in other kinds of real property actions, there can be no such presumption of the validity of the lis pendens." (Plaintiffs' Reply Memorandum of Law, at 6.)

However, this purported distinction is unpersuasive given the facts that led to the underlying suit and notice of lis pendens for each plaintiff here. First, the underlying action against Diamond sought to collect a debt. (Diamond Compl. ¶¶ 41-45.) Lawsuits that involve "determining the existence of a debt" are "ordinarily uncomplicated matters that lend themselves to documentary proof" leading to the conclusion that the risk of erroneous deprivation is insubstantial. *Doehr*, 501 U.S. at 14; *Shaumyan v. O'Neil*, 987 F.2d 122, 126 (2d Cir. 1993) ("[T]he Court [in *Doehr*] emphasized that disputes between debtors and creditors readily lend themselves to accurate ex parte assessments of the merits.")

Specifically, Jones – the plaintiff in the underlying action in Diamond – alleged that he loaned $90,000 to Mendelson – Diamond's husband – in reliance upon Mendelson's promise to repay the loan out of the proceeds of the prospective sale of the Ridge Road property, and that Mendelson signed a promissory note specifying the terms of the loan. (Diamond Compl. at Ex. B.) Thus, while Diamond's case presents an underlying dispute concerning an arguably different type of debt than the mortgage at issue in Diaz, Diamond's underlying action nevertheless lends itself to documentary proof – the promissory note – and therefore does not pose a substantial risk of erroneous deprivation.

Second, the underlying lawsuit against Betesh stemmed from his brother's claim that Betesh obtained title to the property by use of an improperly obtained power of attorney. (Betesh Compl. ¶ 39.)

This action, just as in Diamond, involves documentary proof and is far removed from the allegations of assault that concerned the Supreme Court in *Doehr*. See 501 U.S. at 14. Moreover, New York's lis pendens proceedings provide for a state court hearing on notice and that court has the authority to cancel the notice of pendency if it finds the underlying lawsuit was not prosecuted or maintained in good faith. *See* N.Y. C.P.L.R. § 6514(b); *Diaz* 368 F. Supp. 2d at 273-74. Indeed, a court in a previous constitutional challenge to a similar lis pendens statute – in which the underlying action involved allegations of fraudulent misrepresentation – found that "[t]he prompt postfiling hearing afforded under the statute eliminates the risk of an erroneous deprivation of property interests." *See Williams*, 189 Conn. at 480. Accordingly, this Court finds that in *Diamond* as well as in *Betesh*, the underlying actions are relatively uncomplicated, document based actions where the risk of erroneous deprivation is insubstantial.

3. *The Interest of the Party Seeking the Lis Pendens, with Due Regard for the Government Interest*

This Court in *Diaz* found the countervailing private interest to be "substantial" because the party seeking the lis pendens has a strong interest in ensuring that his claim not be defeated by a prejudgment transfer of the property. 368 F. Supp. 2d at 278 (citing *Williams*, 189 Conn. at 479). Here, plaintiffs contend that "the parties suing [in the underlying actions against Diamond and Betesh] did

not have any interest in the real property other than assuring its availability to pay a judgment if they prevailed." (Plaintiffs' Reply Memorandum of Law, at 6-7.) This argument misstates the interest of the underlying plaintiff in each case. Abraham Betesh filed suit against his brother – plaintiff Joseph Betesh in the present action – contending that Joseph Betesh had fraudulently transferred the property, and seeking a determination by the state court that he had a right to at least part of the property pursuant to New York's probate laws. (Betesh Compl. ¶¶ 41-42.) Similarly, Jones lent money to Mendelson – Diamond's husband – in reliance upon Mendelson's promise to repay the loan out of the proceeds from the prospective sale of the Ridge Road property. (Diamond Compl. at Ex. B.) While the debt owed to Jones may not have been directly related to the purchase of the real property – as in the case of a mortgage – Jones nevertheless possessed a promissory note that was negotiated based on Mendelson's promise to sell the home and pay Jones with the proceeds. Accordingly, Jones had a strong interest in ensuring that his claim not be defeated by a prejudgment transfer.

Moreoever, this Court found in Diaz that the lis pendens statute serves an important state interest by preventing the additional litigation that would result if rights to real property could be defeated by transfer to a purchaser without notice, and thus the statute maintains the public's confidence in the judicial process. 368 F. Supp. 2d at 278. In the present case, this factor weighs just as heavily as it did in Diaz in favor of upholding the constitutionality of the statute.

In sum, the Court concludes that for both Diamond and Betesh, the private interest at stake is relatively minimal, the risk of erroneous deprivation is insubstantial, and the countervailing private interest of the parties seeking the prejudgment remedy and state interests are both significant. Therefore, even in the non-mortgage context alleged in each of the present complaints, the Court concludes that Diamond and Betesh have failed to state valid as-applied due process claims.

C. Diamond's Equal Protection Claim Should Be Dismissed

Diamond also alleges that New York's lis pendens statute violates her right to equal protection of the law because it "discriminates against married persons who are creditors of their spouses by depriving them of the protections, rights, and remedies granted non-spousal creditors without any rational basis." (Diamond Compl. ¶ 68.) Specifically, Diamond contends that she, "as a creditor of Mendelson stands in a disadvantaged position vis a vis Jones" because Jones "was able to place a lis pendens on the marital residence" whereas Diamond claims that she could not do the same. (*Id.* ¶ 56.) To state an equal protection claim, Diamond:

> must allege that a government actor intentionally discriminated against [her] on the basis of [membership in a protected class]. Such intentional discrimination can be demonstrated in several ways. First, a law or policy is discriminatory on its face if it expressly classifies persons on the basis of

> [membership in a protected class]. In addition, a law which is facially neutral violates equal protection if it is applied in a discriminatory fashion. Lastly, a facially neutral statute violates equal protection if it was motivated by animus and its application results in a discriminatory effect.

Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir. 1999) (internal quotation marks and citations omitted).

Diamond's complaint fails to allege, even in conclusory fashion, the basic elements of an equal protection claim. Diamond does not, and indeed cannot, allege that New York's lis pendens statute is discriminatory on its face because the statute does not explicitly refer to marital status or distinguish in any way between spousal and non-spousal creditors. *See* N.Y. C.P.L.R. §§ 6501-6515. Diamond does not allege that the lis pendens statute was motivated by animus or is applied in a discriminatory fashion. Moreover, she cannot credibly allege that the statute's application causes a discriminatory effect. The only reason Jones could file a notice of pendency in connection with his claims and Diamond could not is that Jones brought an action "in which the judgment demanded would affect the title to . . . real property." N.Y. C.P.L.R. § 6501. Diamond, on the other hand, has not brought such an action. Accordingly, Diamond's equal protection claim, both facially and as applied, is dismissed.

D. *Diamond's New York State Constitutional Claims Should Be Dismissed*

Plaintiff Diamond also alleges in a single paragraph of her seventy-two paragraph long complaint that the New York lis pendens statute violates her due process and equal protection rights as guaranteed by the New York State Constitution. (Diamond Compl. ¶71.) However, pursuant to the Eleventh Amendment of the U.S. Constitution, this Court may not grant plaintiff the injunctive relief she seeks against State officials pursuant to her state constitutional claims. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *Alliance of American Insurers v. Cuomo*, 854 F.2d 591, 604 (2d Cir. 1988) ("the Eleventh Amendment precludes the District Court from adjudicating plaintiffs' claim that [two New York statutes] violate New York State's Constitution."). Accordingly, Diamond's state constitutional claims are dismissed.[12]

III. Conclusion

As explained above, because nothing about Diamond and Betesh's due process claims justifies a

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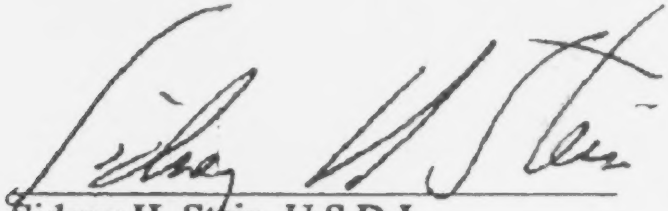
[12] Similarly, in a single paragraph Diamond alleges in a conclusory fashion that the defendants "violate CPLR Article 65, Debtor and Creditor Law, Sections 276 and 278 and other state statutes." (Compl. ¶72.) Nowhere else in the complaint and nowhere in the extensive briefing on these motions are those statutory claims either raised or even adverted to. To whatever extent plaintiff has asserted state statutory claims, the Court declines supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3). See *United Mine Workers v. Gibbs*, 383 U.S. 715, 721-29, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).

result different than that in Diaz, defendants' motions are granted with respect to all due process claims. Because Diamond does not bring valid equal protection or state constitutional claims, the defendants' motion is also granted with respect to those remaining claims. Accordingly, the defendants' motions are granted,[13] and the Clerk of Court is instructed to enter judgment dismissing both complaints.

Dated: New York, New York
February 14, 2007

SO ORDERED:



Sidney H. Stein, U.S.D.J.

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[13] Although Christopher Jones and Abraham Betesh, the plaintiffs in the underlying state actions, have not formally joined in the State defendants' motion to dismiss, the reasoning set forth in this Opinion & Order also applies to any claims against Christopher Jones and Abraham Betesh. Accordingly, they are also dismissed as defendants.

03 Civ. 10194 (SHS)
OPINION & ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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OSCAR DIAZ, on behalf of himself and all others similarly situated,

Plaintiff,

-against-

GEORGE E. PATAKI, individually and in his official capacity as Governor of the State of New York; ELIOT SPITZER, individually and in his capacity as Attorney General of the State of New York; ALAN HEVESI, individually and in his capacity as Comptroller of the State of New York; HECTOR DIAZ, in his official Capacity as Clerk of the County of the Bronx, and on behalf of a defendant class of New York County Clerks; and CHURCHILL MORTGAGE INVESTMENT CORPORATION,

Defendants. :

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SIDNEY H. STEIN, U.S. District Judge.

Introduction

Oscar Diaz brings this action pursuant to 42 U.S.C. § 1983 for alleged violations of the Fifth and Fourteenth Amendments to the United States Constitution. Diaz claims that New York State's lis pendens statute, N.Y. C.P.L.R. §§ 6501-6515 violates

his rights to due process and equal protection of the laws both on its face and as applied to him.

Defendants New York State Governor George E. Pataki, Attorney General Elliot Spitzer, Comptroller Alan Hevesi, and Bronx County Clerk Hector Diaz have now moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim. For the reasons set forth below, that motion is granted.

I. Facts

The following facts are taken from the complaint and are assumed to be true for the purposes of this motion. *See McKenna v. Wright*, 386 F.3d 432, 434 (2d Cir. 2004) (citing *Johnson v. Newburgh Enlarged School District*, 239 F.3d 246, 250 (2d Cir. 2001)). Plaintiff Oscar Diaz ("Diaz") is a New York State resident of Bronx County. (Compl. ¶ 7). Defendant Churchill Mortgage Investment Corporation is a corporation located in Florida and organized pursuant to the law of Delaware.[1] (*Id.* ¶ 12). The other defendants are all officials of the state of New York: George E. Pataki is the Governor; Elliot Spitzer is the Attorney General; Alan G. Hevesi is the Comptroller; and Hector Diaz is the clerk of Bronx County (collectively, "the state defendants"). (*Id.* ¶¶ 8-11). Diaz sues Pataki, Spitzer, and Hevesi in both their individual and

[1] Churchill has never appeared in this action and the court docket does not contain any indication that it has ever been served with the complaint.

official capacities. (*Id.* ¶¶ 8-10). He sues Hector Diaz in his official capacity only. (*Id.* ¶ 11).

In approximately 1992, Diaz took out a mortgage on his home from Churchill in the amount of $65,000. (*Id.* ¶¶ 31-33). He subsequently "fell behind in his mortgage payments" and in 2003 Churchill "commenced foreclosure proceedings ... in the Supreme Court of Bronx County." (*Id.* ¶ 35). At the same time, Churchill filed a notice of pendency, also known as a lis pendens, against Diaz's home with the clerk of Bronx County, to whom Churchill paid a state filing fee. (*Id.* ¶ 23, 24, 35).

Diaz claims that the notice of pendency "makes it, as a practical matter, impossible for him to sell the home." (*Id.* ¶ 37). However, Diaz does not allege that he attempted to sell the home or that an interested buyer declined to purchase the home after learning of the notice of pendency. Diaz alleges that he has meritorious defenses to the mortgage foreclosure action that, according to the statutory scheme, "could not be raised to lift the lis pendens," (*id.* ¶ 40), but Diaz does not allege that he ever moved in the Supreme Court of Bronx County to remove the lis pendens.

II. Diaz's Complaint and Defendants' Motion

Diaz claims that New York's lis pendens statute, N.Y. C.P.L.R. §§ 6501-6515, both facially and as applied to him, violates his rights to due process and equal protection of the laws. Although Diaz's equal protection claim is left unexplained, he founds his due process claim upon *Connecticut v.*

Doehr, 501 U.S. 1, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), which, he claims, "set new and uniform due process standards" that "rendered ... unconstitutional and void" New York's lis pendens statute. (Compl. ¶¶ 4, 28). However, Diaz overlooks the fact that *Doehr* concerned Connecticut's attachment statute, not a lis pendens statute – a crucial distinction for the purposes of due process analysis. Nonetheless, Diaz alleges that *Doehr*'s effect upon New York's lis pendens provision was so patent that defendants "knew or should have known" the New York law was unconstitutional. (Compl. ¶ 28).

Diaz seeks preliminary and permanent injunctive relief, declaratory relief, actual and punitive damages of at least $200,000, and costs and fees. (*Id.* at 7). He also requests that the Court certify a plaintiff and a defendant class and order that all lis pendens filing fees "collected by state defendants" since *Doer* was decided in 1991, "be deposited in a fund to be used by one or more of New York law schools' legal clinics for the assistance of impoverished debtors." (*Id.*).

The state defendants assert several grounds in support of their motion to dismiss the complaint. First, the state statute does not violate due process, either facially or as applied to the facts alleged in Diaz's complaint. Second, Diaz's complaint fails to state an equal protection claim because he has not alleged the existence of a similarly situated class of persons who were treated differently than he. Third, the complaint fails to state a damages claim against defendants Pataki, Spitzer, or Hevesi in their

individual capacities because it fails to allege any wrongful act by those defendants. Fourth, the Eleventh Amendment bars Diaz's claims seeking the forfeiture of lis pendens filing fees, or alternatively, Diaz lacks standing to seek the forfeiture of fees that he has not paid.

III. Standard for a Motion to Dismiss

On a Rule 12(b)(6) motion the court must assess only the "legal feasibility of the complaint...." *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998) (quoting *Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d Cir. 1984)). As set forth above, in deciding a motion to dismiss the Court must accept as true all of the plaintiff's factual allegations and draw all "reasonable inferences" in favor of the plaintiff. *Mason v. Amer. Tobacco Co.*, 346 F.3d 36, 39 (2003). "On the other hand, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." *Id.* (internal quotation marks omitted); *see also Cooper*, 140 F.3d at 440 ("[B]ald assertions and conclusions of law are insufficient...."). Ultimately, the Court may dismiss the plaintiff's complaint if "it appears beyond doubt that he can prove no set of facts in support of his claim *which would entitle him to relief.*" Conley v. Gibson, 355 U.S. 41, 45-46, 79 S.Ct. 99, 2 L.Ed.2d 80 (1957); *see also Swierkiewicz v. Sorema*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

IV. Discussion

A. Plaintiff's Claim for Injunctive Relief Is Moot

Diaz seeks preliminary and permanent injunctions "restraining defendants, their employees, agents, and servants from enforcing" the lis pendens statute against him. (Compl. at 7). "Pursuant to Article III" of the U.S. Constitution, federal courts "have jurisdiction only over live cases and controversies." *ABC, Inc. v. Stewart*, 360 F.3d 90, 97 (2d Cir. 2004). Thus, when a claim has become moot the court is "duty bound" to dismiss it. *Arthur v. Manch*, 12 F.3d 377, 380 (2d Cir. 1993). Additionally, since mootness is a jurisdictional question, the Court may raise it sua sponte. *See United States v. Suleiman*, 208 F.3d 32, 36 (2d Cir. 2000). The court may also refer to evidence outside the pleadings in determining the issue of mootness. *See Flores v. Southern Peru Copper Corp*, 343 F.3d 140, 161 n.30 (2d Cir. 2003); *Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir. 2002); *Lawal v. I.N.S.*, No. 94 Civ. 4606 1996 WL 384917 (S.D.N.Y. July 10, 1996). A claim becomes moot when an event occurs that makes it impossible for a court to grant the plaintiff effectual relief even if he should prevail. *See Suleiman*, 208 F.3d at 36.

Although Diaz alleges in his complaint that the notice of pendency made "it, as a practical matter, impossible for him to sell [his] home," by letter dated March 4, 2005, plaintiff's counsel informed the Court that Diaz "has been able to sell the property that was subject to the Notice of

Pendency" and therefore he "no longer requires injunctive relief." (Compl. ¶ 37; Letter to the Court from Toby Golick, Esq. dated March 4, 2005). Because Diaz has sold the home that he claims was impaired by the lis pendens, any injunction restraining defendants from enforcing the lis pendens would be meaningless. Accordingly, his claim for injunctive relief is dismissed as against all defendants.

B. Diaz Has Failed to State a Claim for Money Damages Against the State Defendants

1. Diaz Has Failed to Allege Adequately the Personal Involvement of Defendants Pataki, Spitzer, and Hevesi

As set forth above, Diaz brings a claim for damages against Messrs. Pataki, Spitzer, and Hevesi in their individual capacities. "It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under section 1983." *Johnson v. Newburgh Enlarged School District*, 239 F.3d 246, 254 (2d Cir. 2001). The personal involvement of supervisory officials, such as Pataki, Spitzer, and Hevesi, requires that they either (1) "participated directly in the alleged constitutional violation"; (2) "failed to remedy the wrong" after being informed of the violation through either a report or appeal; (3) created or continued "a policy or custom under which unconstitutional practices occurred"; (4) were "grossly negligent in supervising subordinates who committed" the unconstitutional acts; or (5) exhibited "deliberate

indifference" to plaintiff's rights by failing to act on information that constitutional violations were occurring. *Id.* (internal quotation marks omitted).

Plaintiff has failed to allege any facts that give rise to an inference of the personal involvement of defendants Pataki, Spitzer, or Hevesi. As to Pataki, the complaint merely alleges that he is governor of New York and is required under the state constitution to "take care that the laws of the state ... are faithfully executed." (Compl. ¶ 8). This blanket allegation, standing alone and contained in a single paragraph of the complaint under a section listing the parties to the action, is legally insufficient give rise to an inference of personal involvement with respect to Governor Pataki.

Similarly, as to defendant Spitzer, the complaint merely alleges that he is "the Attorney General of the State of New York who is responsible for the interpretation, enforcement and implementation of the laws of the State of New York...." (Compl. ¶ 9). Again, this bare allegation by itself cannot give rise to an inference of personal involvement on the part of Attorney General Spitzer, when there is no allegation that Spitzer had anything to do with the operation or application of the lis pendens statute either generally or in this instance.

Last, as to Comptroller Hevesi, plaintiff alleges that Hevesi "is the Comptroller of the State of New York who is responsible for collecting filing fees from the County Clerks of New York, including those for the Notices of Pendency challenged

herein...." (Compl. ¶ 10). That Hevesi collects lis pendens filing fees as part of his official duties as Comptroller does not give rise to an inference of personal involvement on his part. His collection of filing fees is entirely unrelated to the grounds for personal involvement enumerated above; for example, the collection of fees has nothing to do with whether any constitutional violations were reported to Hevesi or whether he created or continued a policy under which violations occurred. Accordingly, the individual capacity damages claims against defendants Pataki, Spitzer, and Hevesi are dismissed for failure to plead adequately the personal involvement of any of those defendants.

2. The Eleventh Amendment Bars Diaz's Claims for Money Damages

Against the State Defendants in their Official Capacities Diaz's complaint fails to specify whether he seeks money damages against the state defendants only in their personal capacities or also in their official capacities. To the extent that he seeks money damages against the state defendants in their official capacities, it is well established that the Eleventh Amendment bars such claims.[2] *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Huminski v. Corsones*, 396 F.3d 53, 70 (2d Cir. 2004);

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[2] The state defendants assume in their motion papers that plaintiff does not seek money damages against the state defendants in their official capacities and Diaz does not dispute that assumption in his responsive papers.

Muntaqim v. Coombe, 366 F.3d 102, 129 (2d Cir. 2004).

The Court also notes that Hector Diaz, the clerk of Bronx County, is a state official for the purposes of filing a notice of pendency and collecting a filing fee. The question of whether Diaz is a state official in this context "is dependent on an analysis of state law ... and the definition of the official's function under relevant state law." *McMillian v. Monroe County*, 520 U.S. 781, 786, 117 S.Ct.1734, 138 L.Ed.2d 1(1997); *see also Huminski*, 396 F.3d at 71. Pursuant to state law, it is "clear" that Diaz's "primary function" is to "serve as clerk of the Supreme Court" of Bronx County, a state court. *Ashland Equities Co. v. Clerk of New York County*, 110 A.D.2d 60, 63, 493 N.Y.S.2d 133, 135 (1st Dep't 1985). Moreover, a lis pendens "is so inherently a part of the judicial process in resolving conflicting interests in real property that its recording amounts to a State function." *Id.* at 64. Accordingly, plaintiff's official capacity damages claims are dismissed as against the state defendants.

C. The Court Exercises Its Discretion to Hear Diaz's Claims Seeking Declaratory Relief

Diaz's only remaining claims seek declaratory relief since his claims for injunctive relief are being dismissed as moot; his claims for damages against Pataki, Spitzer, and Hevesi in their individual capacities are being dismissed for failure to allege personal involvement; and his claims for damages against the state defendants in their official

capacities are being dismissed as barred by the Eleventh Amendment.

The decision whether to entertain claims seeking only declaratory relief rests within the court's "unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995); *see also Dow Jones & Co., Inc. v. Harrods, Ltd.*, 346 F.3d 357 (2d Cir. 2003). The "propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power." *Wilton*, 515 U.S. at 287, 115 S.Ct. 2137, 132 L.Ed.2d 214 (quoting *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 243, 73 S.Ct. 236, 97 L.Ed. 291 (1952)) (internal quotation marks omitted).

The United States Court of Appeals for the Second Circuit has set forth five factors courts must consider in deciding whether to hear a claim for declaratory relief: (1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; (2) whether the judgment would finalize the controversy and offer relief from uncertainty; (3) whether the proposed remedy is being used merely for procedural fencing or a race to res judicata; (4) whether the use of a declaratory judgment would increase friction between sovereign legal systems; and (5) whether there is a better or more effective remedy. Dow Jones, 346 F.3d at 359-60.

In this case, rendering a declaratory judgment would aid in clarifying the constitutionality of the state's lis pendens statute as applied to plaintiff, and finalizing the controversy occasioned by the filing of a lis pendens against plaintiff's home. In addition, plaintiff's claims seeking other forms of relief either have become moot or are being dismissed, leaving declaratory relief as his only available remedy. Last, because there is no pending parallel state court proceeding that has been brought to this Court's attention, this lawsuit neither implicates the sovereignty of another legal system nor is part of a strategy of procedural fencing. Therefore, the Court exercises its discretion to hear plaintiff's claims for declaratory relief.

D. Diaz Has Failed to State an Equal Protection Claim

Diaz alleges that New York's lis pendens statute, N.Y. C.P.L.R. §§ 6501-6515, facially and as applied to him, violates his right to equal protection of the law. To state an equal protection claim, Diaz "must allege that a government actor intentionally discriminated against [him] on the basis of race, national origin, or gender. Such intentional discrimination can be demonstrated in several ways. First, a law or policy is discriminatory on its face if it expressly classifies persons on the basis of race or gender. In addition, a law which is facially neutral violates equal protection if it is applied in a discriminatory fashion. Lastly, a facially neutral statute violates equal protection if it was motivated by animus and its application results in a discriminatory effect." *Hayden v. County of Nassau*,

180 F.3d 42, 48 (2d Cir. 1999) (internal quotation marks and citations omitted).

Diaz's complaint fails to allege, even in conclusory fashion, the basic elements of an equal protection claim. Diaz does not, and indeed cannot, allege that New York's lis pendens statute is discriminatory on its face. He does not allege that he suffered any discrimination on account of his race, national origin, or gender in connection with the events giving rise to this suit. He does not allege that the lis pendens statute is applied in a discriminatory fashion, and he also fails to allege that the statute's enactment was motivated by animus or that the statute's application causes a discriminatory effect. Moreover, Diaz's complaint is utterly devoid of any facts from which the Court could infer the elements of an equal protection claim. Accordingly, Diaz's equal protection claim, both facially and as applied, is dismissed.

E. Diaz Has Failed to State a Due Process Claim

Last, Diaz alleges that New York's lis pendens statute, both facially and as applied to him, violates "the due process rights applicable to prejudgment remedies enumerated by a unanimous *United States Supreme Court in Connecticut v. Doehr*, 501 U.S. 1 (1991)," which held that Connecticut's attachment statute, as applied to intentional tortfeasors, violated due process. (Compl. ¶¶ 4, 28-29).

1. The Lis Pendens Procedure

The Court briefly describes the history of the lis pendens doctrine because history is relevant to due process analysis, see *Connecticut v. Doehr*, 501 U.S. 1, 16-17, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), and because New York's lis pendens statute "evolved from the common law doctrine of lis pendens," *In the Matter of the Estate of Max Sakow*, 97 N.Y.2d 436, 440, 767 N.E.2d 666, 741 N.Y.S.2d 175 (2002).

At common law, the mere filing of a lawsuit claiming an interest in real property served as constructive notice to the world of the suit and the interest claimed by the plaintiff. Regardless of whether a good faith purchaser received actual notice of the suit, "one who acquired the property from a party litigant while the suit was pending took the property subject to the outcome of the action...." *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1319 (3d Cir. 1982). "The purpose of the doctrine was to assure that a court retained its ability to effect justice by preserving its power over the property...." *In the Matter of the Estate of Max Sakow*, 97 N.Y.2d at 440, 767 N.E.2d 666, 741 N.Y.S.2d 175. The lis pendens attached "immediately upon service of process" and "a search of all court records was required to determine whether real property in which a purchaser or encumbrancer sought an interest was the subject of pending litigation." *Id.*

In order to ameliorate the considerable difficulty of searching "all court records," states began to replace the common law doctrine with statutes "requiring the filing of a notice of pendency

before a would-be purchaser or encumbrancer would be charged with notice of the prior interest. This substantially reduced the harshness of the common law rule" since the notice of pendency was indexed in the records of the property itself, and purchasers were charged with knowledge of only what appeared in the index. *Id.* at 441. The first iteration of New York's statute was adopted in 1823 and is now codified at N.Y. C.P.L.R. §§ 6501-6515.

According to the statute, a notice of pendency may only be filed in a suit "in which the judgment demanded would affect the title to, or possession, use, or enjoyment of, real property...." N.Y. C.P.L.R. § 6501 (McKinney 1980 & Supp. 2005). As in the common law tradition, once a notice of pendency is filed against a particular property, it serves as notice to all subsequent purchasers that a suit claiming an interest in the property is pending; a person who records his conveyance or encumbrance after the notice of pendency takes his interest subject to the lawsuit. *Id.* The notice is valid for three years and may be extended for an additional three years only upon a showing of good cause made before the expiration of the initial term. N.Y. C.P.L.R. § 6513 (McKinney 1980 & Supp. 2005). The notice of pendency does not itself prevent the property owner from possessing or alienating the home; "the effect of the lis pendens is simply to give notice to the world of the remedy being sought in the lawsuit itself." *Doehr*, 501 U.S. at 29, 111 S.Ct. 2105, 115 L.Ed.2d 1 (Rehnquist, C.J., concurring).

Although in New York a notice of pendency may be filed ex parte, there are two ways in which

"any person aggrieved" can move to have it lifted. The first is pursuant to N.Y. C.P.L.R. § 6514, which provides mandatory and discretionary grounds for cancellation. Specifically, a court "shall" cancel a notice of pendency if the summons for the underlying lawsuit has not been served within 30 days; if the action has been settled, discontinued, or abated; if the time to appeal from a final judgment against the plaintiff has expired; if enforcement of a final judgment against the plaintiff has not been stayed; if the parties to the suit stipulate to its removal; or if the time to appear in the underlying lawsuit has passed and no parties have appeared. N.Y. C.P.L.R. § 6514(a), (d), (e) (McKinney 1980 & Supp. 2005). Apart from those grounds for mandatory cancellation, a court "may" cancel a notice of pendency if the underlying lawsuit was not prosecuted or maintained in good faith. N.Y. C.P.L.R. § 6514(b) (McKinney 1980 & Supp. 2005).

Second, in all actions except those seeking mortgage foreclosures, partition, or dower, a property owner may also move pursuant to N.Y. C.P.L.R. § 6515 to substitute a bond for the notice of pendency. When entertaining a motion to substitute a bond, the court may consider the merits of the underlying action. *See Weiss v. Allard*, 150 F.Supp.2d 577, 583 (S.D.N.Y. 2001). Once a party moves to substitute a bond, the adverse party may offer his own undertaking in order to keep the notice of pendency in place, and this amount must be sufficient to "indemnify the [property owner] for the damages he may incur if the notice is not cancelled." N.Y. C.P.L.R. § 6515(2) (McKinney 1980 & Supp. 2005).

2. Diaz's Facial Challenge

To plead adequately a facial challenge to the constitutionality of a statute, the plaintiff must allege facts that, if proven, would "establish that no set of circumstances exists under which the challenged Act would be valid." *Cranley v. Nat'l Life Ins. Co. of Vermont*, 318 F.3d 105, 110 (2d Cir. 2003) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)); *Rent Stabilization Ass'n of the City of New York v. Dinkins*, 5 F.3d 591, 595 (2d Cir. 1993). "A plaintiff making a facial claim faces an uphill battle because it is difficult to demonstrate that the mere enactment of a piece of legislation violated the plaintiff's constitutional rights." *Cranley*, 318 F.3d at 110 (quoting *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997)) (internal quotation marks omitted).

The Court dismisses Diaz's facial challenge to New York's lis pendens statute because Diaz has failed to allege facts showing that there exists no set of circumstances under which the statute would be valid. There are, to be sure, many instances in which New York's lis pendens procedures would quite easily satisfy due process. For example, due process would not be offended if a judgment creditor claiming an interest in real property filed a lis pendens against that property. Indeed, a "notice of lis pendens is a well-established, traditional remedy," *Connecticut v. Doehr*, 501 U.S. 1, 29, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991) (Rehnquist, C.J., concurring), that the United States Court of Appeals

for the Second Circuit has described as "a less restrictive means than seizure," *United States v. Premises And Real Property At 4492 South Livonia Road, Livonia, New York*, 889 F.2d 1258, 1265 (2d Cir. 1989); see also *United States v. James Daniel GoodReal Property*, 510 U.S. 43, 58-59, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) (describing lis pendens as one of "various means, short of seizure," by which the government may protect its interest in forfeitable real property).

Courts have held that the filing of a lis pendens does not even constitute a seizure for the purpose of the *Due Process Clause*. *United States v. Register*, 182 F.3d 820, 836-37 (11th Cir. 1999); *United States v. Borne*, No. 03-Crim.-0247, 2003 WL 22836059 at *3 (E.D. La. Nov. 25, 2003); *United States v. One* 1997 E35 Ford Van, VIN 1FBJS31L3VHB70844, 50 F.Supp.2d 789, 808 (N.D. Ill. 1999); *United States v. Real Property Known And Numbered As 429 South Main Street, New Lexington, Ohio*, 906 F.Supp. 1155, 1158-59 (S.D. Ohio 1995); *Batey v. DiGirolamo*, 418 F.Supp. 695 (D. Haw. 1976).

In fact, on prior occasions courts have held that the application of New York's lis pendens statute did not violate due process. *United States v. Premises Known As 281 Syosset Woodbury Road, Woodbury, New York*, 791 F.Supp. 61, 65 (E.D.N.Y. 1992); *United States v. Rivieccio*, 661 F.Supp. 281, 296-97 (E.D.N.Y. 1987). Other, nearly identical lis pendens statutes also have been held constitutional pursuant to the Due Process Clause. Chrysler Corp. v. Fedders Corp., 670 F.2d 1316 (3d Cir. 1982); *New*

Destiny Development Corp. v. Piccione, 802 F.Supp. 692 (D. Conn. 1992); *Williams v.Bartlett*, 189 Conn. 471, 457 A.2d 290 (1983), summarily aff'd, 464 U.S. 801, 104 S.Ct.46, 78 L.Ed.2d 67 (1983).

Diaz has merely pled the circumstances of the mortgage foreclosure proceeding in which he is involved. These facts do nothing to alter the conclusion – reached by a variety of courts – that a statute such as N.Y. C.P.L.R. §§ 6501-6515 is constitutional in a number of scenarios. Because Diaz has failed to plead facts showing that New York's lis pendens statute would violate the Due Process Clause in all circumstances, his facial challenge is dismissed. *See, e.g., Rent Stabilization Ass'n of the City of New York*, 5 F.3d at 595; *Shaumyan*, 987 F.2d at 126; *Premises And Real Property At 4492 South Livonia Road, Livonia, New York*, 889 F.2d at 1263.

3. Diaz's As Applied Challenges

As set forth above, Diaz claims that New York's lis pendens statute violates "new and uniform due process standards for prejudgment remedies" established in *Doehr*, 501 U.S. 1, 111 S.Ct. 2105, 115 L.Ed.2d 1. (Compl. ¶¶ 4, 28-29). *Doehr*, however, established no such "new and uniform" due process standards for prejudgment remedies. Indeed, the Supreme Court in *Doehr* again "underscore[d] the truism that due process, unlike some legal rules, is not a technical conception with fixed content unrelated to time, place and circumstances." *Doehr*, 501 U.S. at 10, 111 S.Ct. 2105, 115 L.Ed.2d 1 (internal quotations marks omitted).

In Doehr, petitioner John DiGiovanni applied to the Connecticut Superior Court for an attachment in the amount of $75,000 on respondent Brian Doehr's home. *Id.* at 5. DiGiovanni applied for the attachment in order to secure any judgment he might win in a civil action he had filed against Doehr for assault and battery. *Id.* "The suit did not involve Doehr's real estate, nor did DiGiovanni have any pre-existing interest either in Doehr's home or any of his other property." *Id.*

Connecticut's prejudgment attachment statute did not afford a pre-attachment hearing, and it did not require that DiGiovanni post a bond to insure against damages that the Doehr might suffer because of a wrongful attachment. *Id.* at 5-6. The Connecticut Superior Court issued the attachment on Doehr's home and Doehr challenged the constitutionality of the Connecticut attachment statute as applied to him. *Id.* at 6.

The Supreme Court held that the Connecticut statute violated due process when applied in connection with intentional tort actions. *Id.* at 13-17. The Court stressed three aspects of its holding: first, because of the nature of intentional tort actions, the risk of erroneous attachment was high. "Unlike determining the existence of a debt or delinquent payments, the issue [in intentional tort suits] does not concern 'ordinarily uncomplicated matters that lend themselves to documentary proof.'" *Id.* at 14 (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974)). Second, the plaintiff in the underlying tort action had a "minimal" interest in the ex parte attachment

because the "plaintiff had no existing interest in Doehr's real estate when he sought the attachment." *Id.* at 16. Balancing the high risk of error against the plaintiff's minimal interest, the Court concluded that the Connecticut statute ran afoul of due process as applied to Doehr's circumstances. Last, the Court noted that history supported its analysis, as prejudgment "attachment is a remedy unknown at common law." *Id.*

The Second Circuit also has stressed that the application of Connecticut's statute to intentional tortfeasors caused the due process problems found by the Supreme Court; indeed, after Doehr the Second Circuit upheld the same statute as applied to a defendant in a lawsuit that claimed an existing interest in the defendant's property. *Shaumyan v. O'Neil*, 987 F.2d 122, 126 (2d Cir. 1993) ("[T]he Court [in *Doehr*] emphasized that disputes between debtors and creditors readily lend themselves to accurate ex parte assessments of the merits.") (quoting *Doehr*, 501 U.S. at 17, 111 S.Ct. 2105, 115 L.Ed.2d).

Diaz has not pled a due process claim pursuant to *Doehr* because that case did not establish procedural prerequisites for lis pendens statutes, and in any event, Diaz has pled facts starkly different from the facts of *Doehr*. First, Doehr concerned prejudgment attachment, a remedy alien to the common law that acts as an "incipient lien," *Doehr*, 501 U.S. at 27, 111 S.Ct. 2105, 115 L.Ed.2d (Rehnquist, C.J., concurring); a lis pendens, by contrast, is a remedy with a long common law history that merely provides notice of a pending

claim. Second, *Doehr* held the Connecticut attachment statute unconstitutional only in connection with underlying intentional tort actions. In his complaint, Diaz alleges that the lis pendens was filed against his home in connection with a mortgage foreclosure proceeding after he fell behind in his mortgage payments – precisely the "category of cases that the *Doehr* Court sought to distinguish from intentional tort cases." *Shaumyan*, 987 F.2d at 126. Accordingly, to the extent that Diaz's complaint specifically pleads his due process claim pursuant to *Doehr*, Diaz has failed to state a claim.

To the extent that Diaz's complaint alleges a broader due process claim, it also must be dismissed. This conclusion results from the Supreme Court's summary affirmance in *Williams v. Bartlett*, 464 U.S. 801, 104 S.Ct. 46, 78 L.Ed.2d 67, which is binding upon this Court. *See Hicks v. Miranda*, 442 U.S. 332, 343-44, 95 S.Ct. 2281, 45 L.Ed.2d 223; *Pinsky v. Duncan*, 898 F.2d 852, 859 (2d Cir. 1990) (Mahoney, J., concurring).

In *Williams*, the Connecticut Supreme Court had upheld the constitutionality of that state's lis pendens statute. As in New York's law, the Connecticut law "provided only for a post-filing hearing...." *Williams*, 189 Conn. at 476, 457 A.2d 290. Unlike New York's law, the Connecticut statute did not contain a bonding provision "whereby the property owner may substitute security to obtain the release of the lis pendens...." *Id.*

The only other difference between the two statutes concerns the post-filing grounds for

cancellation. Pursuant to the Connecticut law, if the property owner moves to have the lis pendens lifted, the person who filed the lis pendens must show "probable cause to sustain the validity" of his claim. *Id.* at 476, n.4. However, this ground for cancellation – which arises only post-filing – provides minimal protection; an identical provision in the Connecticut statute at issue in *Doehr* was satisfied by the filing of "only a skeletal affidavit...." *Doehr*, 501 U.S. at 14, 111 S.Ct. 2105, 115 L.Ed.2d 1. For the purpose of due process analysis, this difference between the Connecticut statute that was constitutionally valid and New York's statute is immaterial, as the post-filing "probable cause" review affords no additional significant protection, especially since New York's statute allows a lis pendens to be cancelled when the action was not prosecuted in good faith.

Moreover, the facts alleged in Diaz's complaint establish that he signed a mortgage, fell behind in his payments, and eventually the mortgage company foreclosed; although Diaz claims that he has meritorious defenses to the foreclosure action, he does not – and cannot – claim that the foreclosure action lacks probable cause. Accordingly, based upon the facts alleged in the complaint, *Williams v. Bartlett*, 189 Conn. 471, 457 A.2d 290 (1983), summarily aff'd, 464 U.S. 801, 104 S.Ct. 46, 78 L.Ed.2d 67 (1983), precludes Diaz from stating a due process claim.

The overwhelming weight of caselaw examining the constitutionality of lis pendens procedures further buttresses this conclusion. The due process analysis turns on three factors: First,

the "private interest" affected by the filing of a lis pendens. *See Doehr*, 501 U.S. at 11, 111 S.Ct. 2105, 115 L.Ed.2d 1. Second, "the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards." *Id.* Third, "the interest of the party seeking the prejudgment remedy, with due regard for any interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Id.*; *see British Int'l Ins. Co. Ltd. v. Seguros La Republica*, 212 F.3d 138, 143 (2d Cir. 2000). An examination of these factors as applied to Diaz's complaint yields the conclusion that he has failed to state a due process claim.

i. The Private Interest

Although the filing of a notice of pendency does have some effect on Diaz's ability to sell the home, "the effect of the lis pendens is simply to give notice to the world of the remedy being sought in the lawsuit itself. The lis pendens itself creates no additional right in the property on the part of the plaintiff [in the underlying suit], but simply allows third parties to know that a lawsuit is pending in which the plaintiff is seeking to establish such a right." *Doehr*, 501 U.S. at 29, 111 S.Ct. 2105, 115 L.Ed.2d 1 (Rehnquist, C.J., concurring); *see also James Daniel Good Real Property*, 510 U.S. at 58-59, 114 S.Ct. 492, 126 L.Ed.2d 490; Register, 182 F.3d at 836-37; *Premises And Real Property At 4492 South Livonia Road, Livonia, New York*, 889 F.2d at 1265; Borne, No. 03-Crim.-0247, 2003 WL 22836059 at *3; *One 1997 E35 Ford Van, VIN*

1FBJS31L3VHB70844, 50 F.Supp.2d at 808; *Real Property Known And Numbered As 429 South Main Street, New Lexington, Ohio*, 906 F.Supp. at 1158-59; *Premises Known As 281 Syosset Woodbury Road, Woodbury, New York*, 791 F.Supp. at 65; *Rivieccio*, 661 F.Supp. at 296-97; *DiGirolamo*, 418 F.Supp. 695. In fact, by giving notice to potential purchasers of a suit claiming an interest in the property, "a notice of lis pendens does nothing that a conscientious seller of property would not do as a matter of course." *Chrysler Corp.*, 670 F.2d at 1329 (quoting *Debral Realty, Inc. v. DiChiara*, 383 Mass. 559, 566, 420 N.E.2d 343 (1981)). Caselaw thoroughly establishes that the interest affected by the filing of a lis pendens is minimal.

ii. Risk of Erroneous Deprivation

Diaz alleges that after he fell behind in his payments, Churchill filed the lis pendens against his home in connection with a mortgage foreclosure proceeding. Suits claiming a pre-existing interest in real property, such as "the existence of a debt or delinquent payments," ordinarily are "uncomplicated matters that lend themselves to documentary proof" and do not pose a risk of erroneous deprivation. *Doehr*, 501 U.S. at 14, 111 S.Ct. 2105, 115 L.Ed.2d 1. Accordingly, the risk of erroneous deprivation is insubstantial when the lis pendens statute is applied in connection with a mortgage foreclosure suit, as is alleged in Diaz's complaint.[3] *See Shaumyan*, 987

[3] Although Diaz alleges that the mortgage he signed was a "scam" that violated applicable lending law, that bald assertion is a "legal conclusion[], deduction[], or opinion[]" that is not

F.2d at 126-27; *Chrysler Corp.*, 670 F.2d at 1329-31; *Piccione*, 802 F.Supp. 697-98; *Williams*, 189 Conn. at 479-81, 457 A.2d 290 (1983), summarily aff'd, 464 U.S. 801, 104 S.Ct. 46, 78 L.Ed.2d 67.

iii. The Interest of the Party Seeking the Lis Pendens, with Due Regard for the Government Interest

The party seeking the lis pendens in connection with a mortgage foreclosure has substantial interests at stake. "[A] notice of lis pendens ensures that the plaintiff's claim cannot be defeated by a prejudgment transfer of the property." *Williams*, 189 Conn. at 479,457 A.2d 290 (1983), *summarily aff'd*, 464 U.S. 801, 104 S.C. 46, 78 L.Ed.2d 67.

Moreover, the lis pendens statute serves important state interests. "If the power of the courts to determine the rights of the parties to real property could be defeated by its transfer, pendente lite, to a purchaser without notice, additional litigation would be spawned and the public's confidence in the judicial process could be undermined.... In lieu of the harsh common law doctrine, a potential purchaser can now readily ascertain whether there is a claim affecting the property." *Chrysler Corp.*, 670 F.2d at 1329.

In sum, the Court concludes that the private interest at stake is relatively minimal, the risk of

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accepted as true for the purposes of a motion to dismiss. *Mason v. Amer. Tobacco Co.*, 346 F.3d 36, 39 (2003).

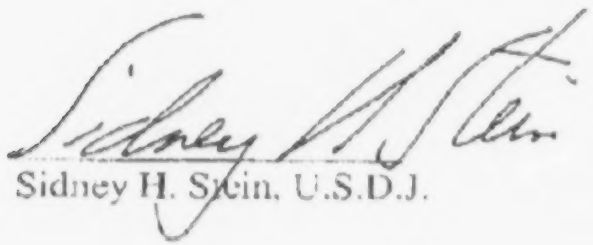
erroneous deprivation is insubstantial, and the countervailing private and state interests are significant. Given the facts alleged in Diaz's complaint - specifically, that he fell behind in his mortgage payments, and that the lis pendens was filed in connection with a mortgage foreclosure proceeding - the Court concludes that Diaz has failed to state a due process claim.

Conclusion

For the reasons set forth above, the state defendants' motion to dismiss Diaz's complaint is granted. The Clerk of Court shall enter judgment dismissing the complaint.

Dated: New York, New York
April 26, 2005

SO ORDERED:



Sidney H. Stein, U.S.D.J.

NEW YORK CIVIL PRACTICE LAW AND RULES
ARTICLE 65- NOTICE OF PENDENCY

§ 6501. Notice of pendency; constructive notice

A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property. The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party.

Rule 6511. Filing, content and indexing of notice of pendency

(a) **Filing**. In a case specified in section 6501, the notice of pendency shall be filed in the office of the clerk of any county where property affected is situated, before or after service of summons and at any time prior to judgment. Unless it has already

been filed in that county, the complaint shall be filed with the notice of pendency.

(b) **Content; designation of index.** A notice of pendency shall state the names of the parties to the action, the object of the action and a description of the property affected. A notice of pendency filed with a clerk who maintains a block index shall contain a designation of the number of each block on the land map of the county which is affected by the notice. Except in an action for partition a notice of pendency filed with a clerk who does not maintain a block index shall contain a designation of the names of each defendant against whom the notice is directed to be indexed.

(c) **Indexing**. Each county clerk with whom a notice of pendency is filed shall immediately record it and index it against the blocks or names designated. A county clerk who does not maintain a block index shall index a notice of pendency of an action for partition against the names of each plaintiff and each defendant not designated as wholly fictitious.

(d) **Electronic indexing**. A county clerk may adopt a new indexing system utilizing electro-mechanical, electronic or any other method he deems suitable for maintaining the indexes.

§ 6512. Service of summons

A notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed. If the defendant dies within thirty days after filing and before the summons is served upon him or publication is completed, the notice is effective only if the summons is served upon his executor or administrator within sixty days after letters are issued.

§6513. Duration of notice of pendency.

A notice of pendency shall be effective for a period of three years from the date of filing. Before expiration of a period or extended period, the court, upon motion of the plaintiff and upon such notice as it may require, for good cause shown, may grant an extension for a like additional period. An extension order shall be filed, recorded and indexed before expiration of the prior period.

§ 6514. Motion for cancellation of notice of pendency

(a) **Mandatory cancellation**. The court, upon motion of any person aggrieved and upon such notice it may require shall direct any county clerk to cancel a notice of pendency, if service of a summons

has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated; or if the time to appeal from a final judgment against the plaintiff has expired; or if enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519.

(b) **Discretionary cancellation**. The court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith.

(c) **Costs and expenses**. The court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action.

(d) **Cancellation by stipulation**. At any time prior to entry of judgment, a notice of pendency shall be cancelled by the county clerk without an order on the filing with him of

1. an affidavit by the attorney for the plaintiff showing which defendants have been served with process, which defendant are in default in appearing or answering, and which defendants have appeared or answered and by whom, and

2. a stipulation consenting to the cancellation, signed by the attorney for the plaintiff and by the attorney for all the defendants who have appeared or answered including those who have waived all

notices, and executed and acknowledged, in the form required to entitle a deed to be recorded, by the defendants who have been served with process and have not appeared but whose time to do so has not expired, and by any defendants who have appeared in person.

(c) **Cancellation by plaintiff.** At any time prior to the entry of judgment a notice of pendency of action shall be cancelled by the county clerk without an order, on the filing with him of an affidavit by the attorney for the plaintiff showing that there have been no appearances and that the time to appear has expired for all parties.

§ 6515. Undertaking for cancellation of notice of pendency; security by plaintiff

In any action other than a foreclosure action as defined in subdivision (b) of section 6516 of this article or for partition or dower, the court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, upon such terms as are just, whether or not the judgment demanded would affect specific real property, if the moving party shall give an undertaking in an amount to be fixed by the court and if:

1. the court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking; or

2. in such action, the plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for the damages that he or she may incur if the notice is not cancelled.

No. 08-890

IN THE

Supreme Court of the United States

OSCAR DIAZ, *et al.*,

Petitioners,

v.

DAVID PATERSON, Governor of New York, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Does New York's notice-of-pendency statute comply with the Due Process Clause of the Fourteenth Amendment, when (1) a notice of pendency merely informs the public about a lawsuit claiming an interest in property, but does not itself create a new property interest, and (2) the statute limits the filing of notices and provides a property owner an opportunity to cancel a notice even apart from defending the lawsuit on the merits?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

STATEMENT 1

REASONS FOR DENYING THE PETITION ... 10

A. The Decision Below Does Not Conflict With Any Precedents Of This Court Or The Courts Of Appeals. 10

B. The Court Of Appeals Properly Held That New York's Notice-Of-Pendency Statute Provides All The Process That Is Due... 17

C. This Case Is A Poor Vehicle For Addressing The Question Presented. ... 25

CONCLUSION 32

TABLE OF CITED AUTHORITIES

Page

Cases

5303 Realty Corp. v. O & Y Equity Corp.,
64 N.Y.2d 313, 476 N.E.2d 276 (1984) ..... *passim*

551 West Chelsea Partners LLC v. 556 Holding LLC,
40 A.D.3d 546, 838 N.Y.S.2d 24 (2007) 2

Aronson v. City of Akron,
116 F.3d 804 (6th Cir. 1997) 11

Ashland Equities Co. v. Clerk of New York County,
110 A.D.2d 60, 493 N.Y.S.2d 133 (1985) 29

Bartlett v. Williams,
464 U.S. 801 (1983) 15

Batey v. Digirolamo,
418 F. Supp. 695 (D. Haw. 1976) 12

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 26

Chrysler Corp. v. Fedders Corp.,
670 F.2d 1316 (3d Cir. 1982) 11, 15, 23

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 29

Cited Authorities

Page

Connecticut v. Doehr,
501 U.S. 1 (1991) ..... *passim*

Considar, Inc. v. Redi Corp. Establishment,
238 A.D.2d 111, 655 N.Y.S.2d 40 (1997) 21

Da Silva v. Musso,
76 N.Y.2d 436, 559 N.E.2d 1268 (1990) .. 15, 24, 28

Darr v. Muratore,
143 B.R. 973 (D.R.I. 1992) 12

Davis v. Scherer,
468 U.S. 183 (1984) 30

Debral Realty, Inc. v. DiChiara,
383 Mass. 559, 420 N.E.2d 343 (1981) 12

Edelman v. Jordan,
415 U.S. 651 (1974) 29

Empfield v. Superior Court,
33 Cal. App. 3d 105, 108 Cal. Rptr. 375
(Cal. Ct. App. 1973) 12

Exxon Mobil Corp. v. Saudi Basic Industries Corp.,
544 U.S. 280 (2005) 7

Cited Authorities

Page

Feingold v. Desarrollos Modernos S.E.,
No. 93-1817, 1994 U.S. Dist. LEXIS 15389
(D.P.R. May 19, 1994) 17

Fuentes v. Shevin,
407 U.S. 67 (1972) 7-8

George v. Oakhurst Realty, Inc.,
414 A.2d 471 (R.I. 1980) 12

Golden v. Zwickler,
394 U.S. 103 (1969) 29

Green Hill Corp. v. Kim,
842 F.2d 742 (4th Cir. 1988) 14

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 31

Hicks v. Miranda,
422 U.S. 332 (1975) 15

Hurtado v. California,
110 U.S. 516 (1884) 16

In re Leonard,
125 F.3d 543 (7th Cir. 1997) 14

In re Sakow,
97 N.Y.2d 436, 767 N.E.2d 666 (2002) 14-15, 28

Cited Authorities

Page

In re Wind Power Systems, Inc.,
841 F.2d 288 (9th Cir. 1988) 14

Israelson v. Bradley,
308 N.Y. 511, 127 N.E.2d 313 (1955) 19

Jackman v. Rosenbaum Co.,
260 U.S. 22 (1922) 16

Kirby Forest Indus., Inc. v. United States,
467 U.S. 1 (1984) 11, 13

Kukanskis v. Griffith,
180 Conn. 501, 430 A.2d 21 (1980) 12

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 29

Mitchell v. W. T. Grant Co.,
416 U.S. 600 (1974) 24

Morrissey v. Brewer,
408 U.S. 471 (1972) 16

Nastasi v. Nastasi,
26 A.D.3d 32, 805 N.Y.S.2d 585 (2005) 2

Olbi USA, Inc. v. Agapov,
283 A.D.2d 227, 724 N.Y.S.2d 839 (2001) 21

Cited Authorities

	Page
Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)	16
Parratt v. Taylor, 451 U.S. 527 (1981)	30
Pearson v. Callahan, 129 S. Ct. 808 (2009)	31
Pix Furniture, Inc. v. Loew's Theatres & Realty Corp., 131 Misc. 2d 517, 500 N.Y.S.2d 959 (Sup. Ct. 1986), *aff'd*, 129 A.D.2d 1018, 513 N.Y.S.2d 648 (1987)	22
Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974)	31
TES Franchising, LLC v. Feldman, 286 Conn. 132, 943 A.2d 406 (2008)	21
Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005)	11
United States v. James Daniel Good Real Property, 510 U.S. 43 (1993)	12
United States v. Jarvis, 499 F.3d 1196 (10th Cir. 2007)	11

Cited Authorities

Page

United States v. Jewell,
538 F. Supp. 2d 1087 (E.D. Ark. 2008) 12

United States v. Property Identified As Lot Numbered 718,
20 F. Supp. 2d 27 (D.D.C. 1998) 16

United States v. Property Identified As Lot Numbered 718,
983 F. Supp. 9 (D.D.C. 1997) 12

United States v. Real Property Known and Numbered as 429 S. Main St.,
52 F.3d 1416 (6th Cir. 1995) 13

United States v. Register,
182 F.3d 820 (11th Cir. 1999) 11

United States v. Rivieccio,
661 F. Supp. 281 (E.D.N.Y. 1987) 12

United States v. Salerno,
481 U.S. 739 (1987) 25

Weiss v. Alard, L.L.C.,
150 F. Supp. 2d 577 (S.D.N.Y. 2001) 22

Cited Authorities

Page

Will v. Mich. Dep't of State Police,
491 U.S. 58 (1989) 29

Williams v. Bartlett,
189 Conn. 471, 457 A.2d 290 (1983) 12, 15

Statutes

Conn. Gen. Stat. § 52-278e 21

Haw. Rev. Stat. § 634-51 (1985) 12

N.Y. C.P.L.R. 6223 21

N.Y. C.P.L.R. 6501 ..... *passim*

N.Y. C.P.L.R. 6511 ..... 1, 15, 19

N.Y. C.P.L.R. 6512 ..... 1, 18, 19

N.Y. C.P.L.R. 6514 ..... 2, 3, 20, 23

N.Y. C.P.L.R. 6515 ..... 3, 22

N.Y. C.P.L.R. article 65 ..... *passim*

Rules

Federal Rule of Civil Procedure 12(b)(6) 26

Page

Treatises

David D. Siegel, *New York Practice* (4th ed. 2005) 3, 22

Jack B. Weinstein et al., *New York Civil Practice: CPLR* (2d ed. 2009) ..... *passim*

STATEMENT

1. Under article 65 of the New York Civil Practice Law and Rules ("C.P.L.R."), a plaintiff pursuing a lawsuit that "would affect the title to, or the possession, use or enjoyment of, real property" may file a notice of pendency with respect to that property.[1] C.P.L.R. 6501. If the notice is properly filed, the outcome of that lawsuit will bind any "person whose conveyance or incumbrance is recorded after the filing of the notice." *Id.*

a. "[T]he notice of pendency shall be filed in the office of the clerk of any county where property affected is situated." *Id.* 6511(a). The notice must be filed with the related complaint (unless the complaint "has already been filed in that county," *id.*), so that "any prospective purchaser of the property can immediately review the complaint to determine whether the plaintiff's claims may actually constitute a cloud on the title." 13 Jack B. Weinstein et al., *New York Civil Practice: CPLR* ¶ 6511.01, at 65-35 (2d ed. 2009) (footnote omitted). The notice must state "the names of the parties to the action, the object of the action and a description of the property affected." C.P.L.R. 6511(b). The notice "is effective only if, within thirty days after filing, a summons is served upon the defendant" or publication of the summons pursuant to a court order is completed. *Id.* 6512.

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[1] Although courts often use the terms interchangeably, "[t]he term '*lis pendens*' properly refers to the common-law doctrine, while the term 'notice of pendency' is the statutory device which supercedes that doctrine." 13 Jack B. Weinstein et al., *New York Civil Practice: CPLR* ¶ 6501.04, at 65-7 (2d ed. 2009) (footnote omitted).

b. "[A]ny person aggrieved" by a notice of pendency may file a motion to cancel the notice. *Id.* 6514. A court "shall direct" the cancellation of a notice if the summons has not been timely served; if the related lawsuit has been "settled, discontinued or abated"; or if final judgment has been entered against the plaintiff and the plaintiff has either failed to obtain a stay or has allowed the time to appeal to expire. *Id.* 6514(a). A court must also cancel a notice of pendency if the related lawsuit does not (as required by C.P.L.R. 6501) "affect the title to, or the possession, use or enjoyment of, real property"—a standard that is construed narrowly. *See 5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 321-22, 476 N.E.2d 276, 281-82 (1984). Finally, even without a court order, a county clerk "shall" cancel a notice of pendency if the parties stipulate to cancellation or if no parties appear in the related lawsuit. C.P.L.R. 6514(d), (e).

In addition to these mandatory grounds for cancellation, a court "may" cancel a notice "if the plaintiff has not commenced or prosecuted the action in good faith," *id.* 6514(b)—for example, if the plaintiff files a notice "for an ulterior purpose," *Nastasi v. Nastasi*, 26 A.D.3d 32, 41, 805 N.Y.S.2d 585, 593 (2005), or "engage[s] in dilatory tactics," *551 West Chelsea Partners LLC v. 556 Holding LLC*, 40 A.D.3d 546, 548, 838 N.Y.S.2d 24, 25 (2007). A court may also "evaluate the claim's legal sufficiency, and if the claim is found legally insufficient and is dismissed, the notice of pendency should be canceled." 13 Weinstein et al., *supra*, ¶ 6501.05, at 65-11 (footnote omitted).

Finally, in all actions except those seeking mortgage foreclosures, partition, or dower, a property owner may move to substitute an undertaking (*i.e.*, a bond) for the notice of pendency. C.P.L.R. 6515. Such an undertaking may lead to cancellation of the notice in two circumstances. First, the notice may be cancelled if "adequate relief can be secured to the plaintiff" by the undertaking. *Id.* 6515(1). Second, even if the property owner's undertaking is inadequate, "the court can still cancel the [notice of pendency] if . . . the plaintiff does not respond with the plaintiff's own undertaking to protect the defendant." David D. Siegel, *New York Practice* § 336, at 538 (4th ed. 2005) (citing C.P.L.R. 6515(2)). In other words, a property owner's offer to post even an insufficient bond may lead to the cancellation of a notice of pendency unless the plaintiff agrees to "indemnify [the owner] for the damages that [the owner] may incur if the notice is not cancelled." C.P.L.R. 6515(2).

c. A court that cancels a notice of pendency on any of the grounds listed in C.P.L.R. 6514—*e.g.*, the property owner prevailed in the related lawsuit; the plaintiff failed to comply with certain procedural requirements; or the plaintiff's lawsuit was in bad faith—"may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action." C.P.L.R. 6514(c). In addition, an aggrieved property owner may sue the plaintiff for malicious prosecution or abuse of process. *See* 13 Weinstein et al., *supra*, ¶ 6514.11, at 65-71 nn.3-4.

2. This case originated as three separate lawsuits filed in the United States District Court for the Southern District of New York, each of which alleged that article 65 violates the Due Process Clause of the Fourteenth Amendment. Although the underlying facts of each case are distinct, their procedural histories are intertwined.

a. In 1992, Bronx resident Oscar Diaz obtained a $65,000 mortgage on his home from Churchill Mortgage Investment Corporation. Pet. App. 52a-53a. After Diaz fell behind on his payments, Churchill initiated foreclosure proceedings in 2003. "At the same time, Churchill filed a notice of pendency . . . against Diaz's home with the clerk of Bronx County." *Id.* at 53a.

Instead of petitioning a state court to remove the notice, *id.*. at 53a, Diaz filed a putative class action in federal court alleging that article 65 violates the federal Due Process and Equal Protection Clauses. *Id.* at 10a. The complaint named as defendants the Governor, Attorney General, and Comptroller of New York State; the Bronx County clerk with whom the notice was filed; and Churchill, the mortgage company and state-court plaintiff. *Id.* at 10a, 52a-53a. Churchill apparently was never served and has not appeared. *Id.* at 52a n.1. The complaint sought injunctive and declaratory relief and damages. *Id.* at 54a.

In 2005, Diaz notified the district court that he had negotiated a sale of his home to satisfy the mortgage, that Churchill's foreclosure action would be dismissed, and that the notice of pendency would accordingly be cancelled. *Id.* at 11a.

b. In 1987, Jehed Diamond and her husband jointly purchased a home in Delaware County, New York. *Id.* at 8a, 36a. After the couple separated, the husband conveyed the title and deed of the home to Diamond. *Id.* at 36a. Several months later, Diamond arranged to sell the property. *Id.* at 8a, 37a. Before the scheduled closing, however, Diamond and her husband were sued in state court by Christopher Jones, who alleged that he had loaned Diamond's husband $90,000 in reliance on a promise to repay the loan from the proceeds of the sale of the house. *Id.* at 37a. To support his allegations, Jones attached to his summons a promissory note that had been signed by Diamond's husband a month before the husband conveyed the home to Diamond. J.A. 52-54. Jones also filed a notice of pendency against the house with the clerk of Delaware County. Pet. App. 37a.

Diamond agreed to place $100,000 from the sale of the house in escrow pending the outcome of Jones's lawsuit. *Id.* Under this escrow agreement, the notice of pendency was canceled, and the sale closed on schedule. *Id.* at 9a.

Diamond then filed a putative class action in federal district court alleging that article 65 violates the Due Process and Equal Protection Clauses of the federal and New York constitutions. *Id.* at 10a. The named defendants were the Governor, Attorney General, and Comptroller of New York State; the Delaware County clerk with whom the notice of pendency was filed; and Jones, the state-court plaintiff. *Id.* The complaint sought injunctive and declaratory relief and damages. *Id.*

Almost two years after the notice of pendency was canceled, Diamond reached a settlement in Jones's state-court lawsuit (J.A. 296-297) under which she agreed to pay Jones most of the money in escrow. Pet. App. 9a.

c. In 1996, Joseph Betesh exercised a power of attorney to transfer his mother's house to himself. Pet. App. 38a. In August 2004, Betesh reached an agreement on a $60,000 home equity loan from a housing program allegedly affiliated with the "New York City Department of Housing and Urban Development."[2] *Id.*; *see also* J.A. 236.

That same month, Betesh's brother Abraham sued Betesh in state court, alleging that the 1996 transfer was improper because it had been made pursuant to an invalid power of attorney. Pet. App. 38a-39a. Abraham also filed a notice of pendency on the house with the Queens County clerk. *Id.* at 11a, 39a. After learning of the lawsuit between the brothers, the housing program informed Betesh that it could no longer provide the $60,000 home equity loan. *Id.* at 39a. In March 2005, Betesh filed in state court a motion to vacate the notice and to dismiss his brother's claims. *Id.*

In May 2005, Betesh filed his federal complaint, alleging a violation of the federal Due Process Clause. *Id.* at 11a-12a. Like Diaz and Diamond, Betesh sued the Governor, Attorney General, and Comptroller of New York State; he also named as defendants the Queens County clerk and his brother Abraham, the state-court

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[2] No entity by this name exists.

plaintiff. *Id.* at 10a, 12a. The complaint sought injunctive and declaratory relief and damages. *Id.*

After Betesh filed his federal complaint, his brother's state court action was dismissed, and the notice of pendency was canceled. *Id.* at 12a.

d. All three federal cases were assigned to the same district court judge. The district court initially dismissed the *Diamond* complaint on *Rooker-Feldman* grounds and the *Diaz* complaint for failure to state a claim. Pet. App. 12a-13a, 77a. Both Diamond and Diaz appealed. The Second Circuit remanded the *Diamond* case in light of this Court's decision in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005), which limited the scope of the *Rooker-Feldman* doctrine, and allowed Diaz to withdraw his appeal without prejudice to reactivation after a final judgment in the remanded *Diamond* case. *Id.* at 14a.

In the meantime, Betesh had filed his federal complaint. *Id.* at 11a, 14a. The district court consolidated *Betesh* with the remanded *Diamond* case and ultimately dismissed both complaints for failure to state a claim. *Id.* at 14a, 49a-50a. On appeal, the Second Circuit reactivated the *Diaz* case and considered all three lawsuits together. *Id.* at 14a.

3. In a unanimous opinion, the Second Circuit affirmed the district court's decisions and rejected petitioners' due process claims. *Id.* at 1a-32a. Without deciding whether a notice of pendency effects a "'significant taking of property'" that gives rise to due process rights, *id.* at 17a (quoting *Fuentes v. Shevin*,

407 U.S. 67, 86 (1972)), the court held that New York's statute provides "all the process that is due" under *Connecticut v. Doehr*, 501 U.S. 1 (1991). Pet. App. 17a.

Doehr addressed a due process challenge to Connecticut's prejudgment attachment statute, which allowed plaintiffs with claims unrelated to real property—such as the assault-and-battery claim in *Doehr*—to attach real property owned by defendants. 501 U.S. at 4-5. Connecticut's attachment statute thus allowed plaintiffs to create a new property interest that they would otherwise have no basis to assert. This Court invalidated Connecticut's statute after balancing the private interests of property owners, the risk of erroneous deprivation of their property rights, and the interests of the State and plaintiffs in the attachment procedure. *Id.* at 11-18.

Using these same three factors, the court of appeals here upheld article 65. Under the first *Doehr* factor, the court evaluated the effect of the notice of pendency on a property owner's private interests. Although petitioners had alleged that notices of pendency impaired the marketability of their property, the court concluded that this factor did not support petitioners' position as decisively as it had in *Doehr*. Pet. App. 21a-23a. The court noted that a notice of pendency is "one of the 'less restrictive' means of protecting a disputed property interest," since an owner "continues to be able to inhabit and use the property, receive rental income from it, enjoy its privacy, and even alienate it." *Id.* at 22a. The court found that notices of pendency had a lesser effect on private interests than attachments because of article 65's limited scope: it is strictly

interpreted as allowing a notice of pendency only when "'the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property.'" *Id.* (quoting C.P.L.R. 6501). Finally, the court questioned the plausibility of petitioners' allegations of nonmarketability, *id.* at 22a n.6, although it ultimately assumed the truth of these allegations.

The second *Doehr* factor considers the risk of erroneous deprivation and the value of additional statutory safeguards. The court found that "the risk of erroneous deprivation is minimal" under New York's notice-of-pendency procedure, since that procedure "is available only to claimants asserting a defined interest in the property." *Id.* at 23a. The court observed that the notices filed against petitioners here were related to lawsuits "involv[ing] relatively 'uncomplicated matters that lend themselves to documentary proof.'" *Id.* (quoting *Doehr*, 501 U.S. at 14). In addition, the court found the risk of error to be further reduced by the procedural safeguards in article 65, which include a requirement of notice to property owners and a right to a court hearing. *Id.* at 24a-26a.

Finally, under the third *Doehr* factor, the court considered the interests of the State and of the claimants who had filed the notices of pendency. The court found that the State had a significant interest in article 65 because its procedures "protect[] the court's power over the disposition of [disputed] property" and thus increase the public's confidence in the effectiveness of the judicial process. *Id.* at 27a-28a. In addition, the court found a significant interest in those who filed notices of pendency, since in New York the filers

necessarily claim an "existing interest[] in the realty at issue." *Id.* at 27a.

After balancing the three *Doehr* factors, the court concluded that "[i]n view of the procedural safeguards of Article 65—in particular its narrow application to pre-existing claims affecting the property, and its provisions for post-deprivation notice and hearing—the statute satisfies the Due Process Clause of the Fourteenth Amendment." *Id.* at 28a. Accordingly, the court affirmed the dismissal of petitioners' as-applied and facial challenges. *Id.*

The court declined to consider petitioners' contention that article 65 denies them their right of access to the courts, finding that this issue was "raised for the first time on appeal." Pet. App. 15a.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. In addition, several features of this litigation make it an inappropriate vehicle for resolving petitioners' constitutional claims. This Court's review is therefore not warranted.

A. The Decision Below Does Not Conflict With Any Precedents Of This Court Or The Courts Of Appeals.

Petitioners have failed to identify any significant split in authority over the constitutionality of notice-of-pendency procedures. The decisions of both this Court

and the courts of appeals have uniformly found that notices of pendency do not implicate significant property interests and that state-law procedures substantially similar to article 65 afford property owners all the process they are due. The issue therefore does not warrant this Court's review at this time.

1. To state a due process claim, petitioners must first demonstrate that they were deprived of a significant property interest. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). As the court below explained, the filing of a notice of pendency does not formally affect any of the incidents of property ownership; an owner "continues to be able to inhabit and use the property, receive rental income from it, enjoy its privacy, and even alienate it." Pet. App. 22a (citing *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14-15 (1984)). Nor does a notice of pendency vest in the filer any additional rights to the contested property. Instead, the only legal effect of a notice of pendency is to provide information to the public about a pending lawsuit that may affect ownership rights in the property at issue. *See Doehr*, 501 U.S. at 29 (Rehnquist, C.J., concurring); *United States v. Jarvis*, 499 F.3d 1196, 1203 (10th Cir. 2007); 13 Weinstein et al., *supra*, ¶ 6501.00, at 65-4.

Because of these features, the courts of appeals that have addressed the issue have unanimously held that the filing of a notice of pendency does not implicate the Due Process Clause. *See Jarvis*, 499 F.3d at 1203; *United States v. Register*, 182 F.3d 820, 837 (11th Cir. 1999); *Aronson v. City of Akron*, 116 F.3d 804, 811-12 (6th Cir. 1997); *see also Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1334-37 (3d Cir. 1982) (Hunter, J., concurring);

United States v. Jewell, 538 F. Supp. 2d 1087, 1093 (E.D. Ark. 2008); *United States v. Property Identified As Lot Numbered 718*, 983 F. Supp. 9, 11 (D.D.C. 1997); *Darr v. Muratore*, 143 B.R. 973 (D.R.I. 1992); *United States v. Rivieccio*, 661 F. Supp. 281, 297 (E.D.N.Y. 1987); *Batey v. Digirolamo*, 418 F. Supp. 695, 697 (D. Haw. 1976). With one exception, every published state court decision to consider the issue has also agreed. *See Debral Realty, Inc. v. DiChiara*, 383 Mass. 559, 563-66, 420 N.E.2d 343, 347-48 (1981); *George v. Oakhurst Realty, Inc.*, 414 A.2d 471, 474 (R.I. 1980); *Empfield v. Superior Court*, 33 Cal. App. 3d 105, 108, 108 Cal. Rptr. 375, 377 (Cal. Ct. App. 1973). The one exception is the Connecticut Supreme Court, which held in *Kukanskis v. Griffith*, 180 Conn. 501, 509-11, 430 A.2d 21, 25 (1980), and *Williams v. Bartlett*, 189 Conn. 471, 476-79, 457 A.2d 290, 293-94 (1983), that the filing of a notice of pendency affected significant property interests. But that court ultimately held that Connecticut's statute provided all the process that was due, *see Williams*, 189 Conn. at 479-81, 457 A.2d at 294-95, and thus there is no square split on the constitutional question.

2. This Court's precedents have likewise acknowledged that a notice of pendency does not affect significant property interests. In *United States v. James Daniel Good Real Property*, 510 U.S. 43, 47-48 (1993), the Court held that the ex parte seizure of property used to commit drug offenses violated the Due Process Clause. As an alternative to such seizures, the Court suggested that "filing a notice of *lis pendens* as authorized by state law"—which in that case would not have required prior notice or a hearing, *see* Haw. Rev. Stat. § 634-51 (1985)—would protect the government's

interests. 510 U.S. at 58; *see also United States v. Real Property Known and Numbered as 429 S. Main St.*, 52 F.3d 1416, 1420 (6th Cir. 1995) (noting that, under *Good*, "the government could file a *lis pendens* . . . without a predeprivation hearing"). Analogously, this Court has recognized in the takings context that the mere filing of a notice of pendency does not impair property interests "in any constitutionally significant way," even if the notice "reduced the price that the land would have fetched." *Kirby Forest Indus.*, 467 U.S. at 15, 16.

Petitioners' primary argument for granting certiorari is that the decision below "directly conflicts" with *Doehr*, which struck down Connecticut's prejudgment attachment statute. Pet. 20. But as Chief Justice Rehnquist recognized in *Doehr* itself, the purely informational effect of a notice of pendency contrasts sharply with a prejudgment attachment. *See* 501 U.S. at 29 (Rehnquist, C.J., concurring). An attachment creates a lien in the subject property—a property right that did not previously exist—while a notice of pendency does not. *Compare* 12 Weinstein et al., *supra*, ¶ 6216.05, at 62-170, *with* 13 *id.* ¶ 6501.11, at 65-24. The state-court plaintiff in *Doehr*, for instance, had brought only an assault-and-battery claim, and thus had no pre-existing interest in the defendant's property before he filed the attachment. *See* 501 U.S. at 5. By contrast, a notice of pendency—rather than *creating* a plaintiff's interest in real property—merely *reflects* a property right that has been asserted or established in the collateral lawsuit.[3] Accordingly,

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[3] The federal courts have acknowledged this distinction in bankruptcy proceedings, in which attachments receive far greater protection than mere notices of pendency. (Cont'd)

any harm that property owners may suffer derives not from the notice of pendency itself, but from the collateral lawsuit, whose outcome binds all subsequently recorded purchasers and encumbrancers. *See* C.P.L.R. 6501. Because of the fundamental difference between an attachment and a notice of pendency, the court of appeals' decision here is entirely consistent with *Doehr*.

Article 65's historical provenance confirms that, unlike the attachment at issue in *Doehr*, a notice of pendency itself affects no property interests. Notices of pendency originated from the well-established common-law doctrine of lis pendens, *see 5303 Realty Corp.*, 64 N.Y.2d at 318, 476 N.E.2d at 279, which presumed that *all* transferees, however innocent, had constructive notice of any legal action against the property in question, *see* 13 Weinstein et al., *supra*, ¶ 6501.01, at 65-4 to 65-5. Today, New York law—like the law of most other states—no longer presumes constructive notice from the mere filing of a lawsuit. Instead, article 65 "substantially reduced the harshness of the common-law rule," *In re Sakow*, 97 N.Y.2d 436,

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(Cont'd)

Compare, e.g., In re Leonard, 125 F.3d 543, 545 (7th Cir. 1997) (bankruptcy trustee can ignore previously filed notice of pendency in avoiding pre-petition claims), *with In re Wind Power Systems, Inc.*, 841 F.2d 288, 292-93 (9th Cir. 1988) (bankruptcy trustee cannot ignore previously filed attachment in avoiding pre-petition claims). *See also Green Hill Corp. v. Kim*, 842 F.2d 742, 744 (4th Cir. 1988) (previously filed notice of pendency, in the absence of a pre-petition entry of judgment, did not entitle plaintiff to relief from automatic bankruptcy stay).

441, 767 N.E.2d 666, 669 (2002), by binding subsequent purchasers only if the plaintiff had recorded notice of the pending lawsuit in a central registry. *See* C.P.L.R. 6501, 6511; *Da Silva v. Musso*, 76 N.Y.2d 436, 439, 559 N.E.2d 1268, 1268-69 (1990); *5303 Realty Corp.*, 64 N.Y.2d at 319, 476 N.E.2d at 280. But article 65 neither originated nor exacerbated the burdens faced by owners, such as petitioners, whose property was the subject of legal contest. Under the common law predating article 65, a lawsuit asserting an interest in real property *already* hindered the ability of property owners to alienate or encumber their property.

3. Even if notices of pendency triggered due process protections, unanimous appellate authority confirms the constitutional adequacy of notice-of-pendency procedures similar to those contained in article 65. This Court approved of such procedures when it dismissed "for want of [a] substantial federal question," *Bartlett v. Williams*, 464 U.S. 801 (1983), an appeal from the Connecticut Supreme Court's decision in *Williams v. Bartlett*, 189 Conn. 471, 457 A.2d 290 (1983). *See Hicks v. Miranda*, 422 U.S. 332, 343-344 (1975) (holding that such dismissals are decisions on the merits). The Connecticut court evaluated a notice-of-pendency statute that was substantially similar to New York's (Pet. App. 72a-73a), and concluded that the statute "meets the minimum requirements of procedural due process under the fourteenth amendment." 189 Conn. at 480-81, 457 A.2d at 294-95. The Third Circuit has reached the same conclusion in evaluating New Jersey's statute, which bears an even greater similarity to article 65. *See Chrysler Corp.*, 670 F.2d at 1327-31.

That article 65 derives from a well-established common-law tradition also supports its constitutionality under this Court's precedents. *See Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.) ("If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."); *Hurtado v. California*, 110 U.S. 516, 528 (1884) ("[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country."); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 31 (1991) (Scalia, J., concurring) ("If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process."). By contrast, the attachment procedure invalidated in *Doehr* was "a remedy unknown at common law." *Doehr*, 501 U.S. at 16.

None of the cases cited by petitioners support their contention that there is a split of appellate authority about the constitutional question. Most of petitioners' cases do not involve notices of pendency at all but rather other devices such as liens or attachments. *See* Pet. 22-23. Given the inherently fact-based test for procedural due process claims, *see Doehr*, 501 U.S. at 10; *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), these cases are consistent with the uniform precedents upholding statutes like article 65.

Petitioners have cited only two trial-level rulings that do involve notices of pendency, but neither is apposite here. In *United States v. Property Identified As Lot Numbered 718*, 20 F. Supp. 2d 27 (D.D.C. 1998) (cited at Pet. 22-23), the court did not rule on the

constitutional question at issue here, instead concluding that, under the unusual facts of that case, the government had committed an "abuse of . . . process" by using a notice "as a bargaining chip in negotiations about the [property's] sale proceeds and generally to settle this case." *Id.* at 35. In *Feingold v. Desarrollos Modernos S.E.*, No. 93-1817, 1994 U.S. Dist. LEXIS 15389 (D.P.R. May 19, 1994) (cited at Pet. 21 n.7), the court issued an unpublished disposition in which the discussion of the constitutional claim was dicta, as the court had already held that the notice violated Puerto Rico law. *See id.* at *7-*9. Thus, no significant federal or state authority conflicts with the court of appeals' decision here, which faithfully applied *Doehr*'s analysis of attachments to the quite different context of notices of pendency.

B. The Court Of Appeals Properly Held That New York's Notice-Of-Pendency Statute Provides All The Process That Is Due.

The court of appeals assumed for argument's sake that notices of pendency implicate significant property interests, but held that article 65 provides property owners with all the process they would be due under *Doehr*. *See* Pet. App. 21a-28a. The court correctly found important distinctions between Connecticut's attachment statute and New York's notice-of-pendency statute, and it accordingly held that the three factors considered in *Doehr* support the constitutionality of article 65.

1. The first *Doehr* factor is "the private interest that will be affected by the prejudgment measure."

501 U.S. at 11. Petitioners claim that notices of pendency prevented them from alienating or otherwise encumbering their properties, Pet. 26, and the court below accepted these allegations to "conclude that the first *Doehr* factor supports [petitioners'] position, although not so decisively as in *Doehr*." Pet. App. 22a-23a. The court correctly minimized petitioners' alleged harms. As explained above, unlike the harm caused by an attachment, any harm suffered by a property owner from a notice of pendency stems not from the notice itself but rather from the collateral lawsuit involving the property. In effect, then, petitioners' alleged private interests reduce to interests in concealing the existence of pending litigation or transferring their property despite competing ownership claims. Even if such interests were legitimate, which as the court of appeals noted is questionable (Pet. App. 22a n.6), they would be less weighty than the property owner's right in *Doehr* to sell property that had no inherent relationship to a personal-injury lawsuit.

2. The second *Doehr* factor is "the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards." *Doehr*, 501 U.S. at 11. The court below properly found that the procedural protections of article 65 create a significantly lower risk of error than the attachment procedures in *Doehr*. Pet. App. 23a-26a.

a. First, article 65 imposes several procedural requirements for filing a notice of pendency, *see* C.P.L.R. 6501-6512, which courts strictly enforce. *See 5303 Realty Corp.*, 64 N.Y.2d at 320-21, 476 N.E.2d at 281. A plaintiff who fails to comply with these requirements at the outset

forfeits the right to file any further notices on the property at issue. *See Israelson v. Bradley*, 308 N.Y. 511, 515-16, 127 N.E.2d 313, 315 (1955); *see also 5303 Realty Corp.*, 64 N.Y.2d at 320, 476 N.E.2d at 281 ("[A] subsequent, amended complaint cannot be used to justify an earlier notice of pendency.").

Petitioners nevertheless contend that this Court should impose another threshold procedure: service of the notice of pendency itself. *See* Pet. 28-29. But article 65 already mandates that plaintiffs notify defendants by serving or publishing the summons within thirty days, *see* C.P.L.R. 6512, and petitioners offer no explanation of the "probable value" of their proposed "additional . . . safeguard[ ]." *Doehr*, 501 U.S. at 11. The sole purpose of a notice of pendency is to provide notice of a pending lawsuit. *See* 13 Weinstein et al., *supra*, ¶ 6501.11, at 65-23. But the mandatory service or publication of summons already notifies owners of the lawsuits against their property, and, because notices of pendency are recorded, *see* C.P.L.R. 6511(c)-(d), property owners notified of a summons can easily check with the county clerk's office to determine whether a notice has been filed.

In any event, petitioners have not explained how they were prejudiced by the plaintiffs' failure to serve notices of pendency here. Both Diamond and Betesh received actual notice of their respective notices of pendency within a few weeks of service of the summons, and both timely petitioned the state courts to cancel the notices. *See* Pet. App. 36a-39a; J.A. 36-37. And because Diaz never asked for the notice of pendency to be removed, even after he had undisputed knowledge

of it, *see* Pet. App. 53a, it is not clear how he could have been helped by the additional service of the notice.

b. Second, property owners who are aggrieved by a notice of pendency may move to cancel the notice on a variety of grounds. *See* C.P.L.R. 6514. While courts do not resolve the merits of the lawsuit in determining whether to cancel a notice (Pet. App. 24a-25a), they may still evaluate the "legal sufficiency" of the plaintiff's claims, 13 Weinstein et al., *supra*, ¶ 6501.05, at 65-11.

That evaluation is aided here by a crucial distinction between article 65 and the procedures at issue in *Doehr*. This Court found a substantial risk of erroneous deprivation in Connecticut's attachment procedures because "the assault and battery claim at issue [t]here" did not "lend [itself] to accurate *ex parte* assessment[ ] of the merits." 501 U.S. at 17. By contrast, the Court expressly noted that accurate merits assessments were more likely for "disputes between debtors and creditors," which often "involve[] uncomplicated matters that lend themselves to documentary proof." *Id.* at 15, 17. Here, the court below observed that petitioners were involved in just such disputes: the notices of pendency "were filed by creditors whose claims were pre-existing, readily quantifiable, and largely susceptible to proof by documentary evidence." Pet. App. 23a. The plaintiff in Diamond's case filed with his state-court complaint a promissory note signed by Diamond's husband (J.A. 54); the plaintiff in Diaz's case relied upon a formal mortgage; and Betesh's brother cited the documents that Betesh had relied upon for the earlier transfer. *See* Pet. App. 23a. The state courts here thus had before them far more than the "skeletal affidavit" in *Doehr*, 501 U.S. at

14, and could conduct a more searching inquiry into the legal sufficiency of the plaintiffs' claims.

Petitioners object (Pet. 21, 29) that article 65's hearing does not require plaintiffs to prove a likelihood of success on the merits, as do New York's and Connecticut's attachment laws. *See* C.P.L.R. 6223(b); Conn. Gen. Stat. § 52-278e(e). The court below properly observed that *Doehr* did not mandate such a standard. *See* Pet. App. 26a. In any event, petitioners have not shown how such a hearing would have helped them. In both New York and Connecticut, plaintiffs seeking attachments need not prove the merits of their claims; they need establish only a prima facie or bona fide case supported by facts. *See TES Franchising, LLC v. Feldman*, 286 Conn. 132, 137, 943 A.2d 406, 411 (2008); *Olbi USA, Inc. v. Agapov*, 283 A.D.2d 227, 724 N.Y.S.2d 839 (2001). The courts of both States have held that documentary evidence is sufficient to make such a showing. *See TES Franchising*, 286 Conn. at 144-45, 943 A.2d at 415-16; *Considar, Inc. v. Redi Corp. Establishment*, 238 A.D.2d 111, 112, 655 N.Y.S.2d 40, 41 (1997). Here, the plaintiffs in all of petitioners' cases presented just such evidence in support of their state-law claims. *See* Pet. App. 23a, 73a. It seems likely, then, that they would have satisfied even the heightened showing that petitioners demand. This is particularly true for Diaz: the mortgage company's state-law claims were supported by clear documentary evidence (namely, the mortgage), but Diaz himself admits that his defenses and counterclaims, by contrast, "were not simple." Pet. 14.

c. Third, although a majority of this Court has never required the posting of a bond in connection with prejudgment remedies, *see* Pet. App. 26a, article 65 does provide an adequate bond procedure to relieve property owners of notices of pendency. *See* C.P.L.R. 6515.

Petitioners object that article 65 does not require plaintiffs *alone* to post a bond when filing a notice of pendency. Pet. 30-31. But this objection overlooks the actual operation of C.P.L.R. 6515. Although that provision requires a property owner to post a bond in the first instance, the notice of pendency may be canceled unless the plaintiff then responds with his own bond—even if the property owner's bond is inadequate as a substitute for the property in dispute. *See* C.P.L.R. 6515(2); Siegel, *supra*, § 336, at 538 (noting that C.P.L.R. 6515(2) is "a kind of lever the defendant can pull to try to make the plaintiff furnish an undertaking in return"). When a property owner invokes this mutual-bonding procedure, the court has discretion to determine the relative amount of the two bonds, and in making that determination it may consider the plaintiff's likelihood of success on the merits. *See Weiss v. Alard, L.L.C.*, 150 F. Supp. 2d 577, 583 (S.D.N.Y. 2001); *Pix Furniture, Inc. v. Loew's Theatres & Realty Corp.*, 131 Misc. 2d 517, 519, 500 N.Y.S.2d 959, 961 (Sup. Ct. 1986) ("[T]he court may consider the merits, the good faith of the plaintiff and the possibility of his being successful on the facts which are presented to the court."), *aff'd*, 129 A.D.2d 1018, 513 N.Y.S.2d 648 (1987). Thus, as a practical matter, C.P.L.R. 6515 adequately protects property owners against notices of pendency filed in conjunction with patently unmeritorious lawsuits.

d. Fourth, article 65 minimizes errors by exposing plaintiffs to liability if a notice of pendency is canceled. A court "may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action." C.P.L.R. 6514(c). And property owners may also sue plaintiffs for malicious prosecution or abuse of process. *See* 13 Weinstein et al., *supra*, ¶ 6514.11, at 65-71 nn.3-4.

e. Finally, outside of article 65's procedures, property owners who dispute a notice of pendency can always defend themselves on the merits against the plaintiffs' claims and seek cancellation of the notice after prevailing.

3. The third *Doehr* factor considers the interests of the government and of the plaintiff who filed the notice of pendency. *Doehr*, 501 U.S. at 11.

As the court below found (Pet. App. 27a-28a), article 65 serves a crucial state interest not directly present in *Doehr*: it "assure[s] that a court retain[s] its ability to effect justice by preserving its power over the property." *5303 Realty Corp.*, 64 N.Y.2d at 319, 476 N.E.2d at 280. By contrast, "[i]f the power of the courts to determine the rights of the parties to real property could be defeated by its transfer, pendente lite, to a purchaser without notice, additional litigation would be spawned and the public's confidence in the judicial process could be undermined." *Chrysler Corp.*, 670 F.2d at 1329. Petitioners do not challenge this conclusion as a general matter, asserting only that New York has no "legitimate interest" in "the features of [article 65] that petitioners challenge." Pet. 31. But "the specific statutorily

prescribed mechanisms for implementing this provisional remedy . . . were designed with a view toward balancing the interests of the claimant in the preservation of the status quo against the equally legitimate interests of the property owner in the marketability of his title." *Da Silva*, 76 N.Y.2d at 442, 559 N.E.2d at 1271. "[T]his statutory procedure effects a constitutional accommodation of the conflicting interests of the parties." *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 607 (1974).

Plaintiffs who file notices of pendency also have significant interests. *See* Pet. App. 26a-27a. Unlike the plaintiff in *Doehr*, who "had no existing interest in Doehr's real estate when he sought the attachment," 501 U.S. at 16, plaintiffs who invoke article 65 are required to assert claims "affect[ing] the title to, or the possession, use or enjoyment of, real property," as the plaintiffs here did. C.P.L.R. 6501. In addition, while "there was no allegation that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment," 501 U.S. at 16, two of the petitioners here were about to engage in just such behavior: Diamond was about to sell her property, and Betesh had applied for a home equity loan. *See* Pet. App. 27a n.8. The third *Doehr* factor thus weighs heavily in favor of article 65's constitutionality.

4. Balancing these three factors, the court of appeals correctly concluded that article 65 is constitutional. The extensive protections that article 65 affords to property owners and the strong interests of

the State and claimants outweigh the relatively mild burden that notices of pendency may pose to property owners. Because the court of appeals' fact-specific ruling is correct, it does not warrant this Court's review.

C. This Case Is A Poor Vehicle For Addressing The Question Presented.

Even if the question presented here were otherwise worthy of this Court's review—and as explained above it is not—this case would be a poor vehicle for addressing it.

1. The narrow impact of this case does not merit this Court's review. Although petitioners assert that their due process argument has broad significance, their constitutional claims are in fact limited to the specific facts of their own cases. Petitioners initially raised a facial challenge to article 65, but they have never attempted to show that "no set of circumstances exists under which [article 65] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). As the district court properly noted, "[t]here are . . . many instances in which New York's lis pendens procedures would quite easily satisfy due process," such as when "a judgment creditor claiming an interest in real property filed a lis pendens against that property." Pet. App. 67a; *see also id.* at 28a, 41a. As a result, petitioners' only argument is that the court of appeals' careful, fact-intensive balancing of the *Doehr* factors was incorrect as applied to their unique situations.

In addition, as the court of appeals noted (Pet. App. 22a n.6), some of petitioners' allegations of harm are

implausible even under petitioners' interpretation of the facts, making their specific cases particularly poor candidates for further review.[4] *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (allegations in a complaint must be plausible on their face). For example, although petitioners Diaz and Diamond allege that the notices of pendency affected their ability to alienate their properties, their other factual allegations suggest that the notices had little to no actual effect. Diaz sold his property "at a price somewhat below market value" but simultaneously obtained the discontinuation of the foreclosure proceedings against him. J.A. 199. Diamond also sold her property at a time and price she had negotiated before the notice of pendency was filed. *See* Pet. App. 37a. The only effect of the notice was to induce Diamond to put into escrow $100,000 from the sale of the property to cover her potential liability in the state-court lawsuit—money she could have retained in its entirety if she had prevailed in that lawsuit.[5] *See* Pet. App. 37a; J.A. 37, 294-295. Thus, in both cases,

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[4] While petitioners claim that there is "a rich district court record documenting the actual workings of . . . Article 65" (Pet. 24), their cases were dismissed under Federal Rule of Civil Procedure 12(b)(6) (Pet. App. 40a, 55a), and thus there is no "record," only untested allegations.

[5] After the state court granted summary judgment to plaintiff Jones (J.A. 83), Diamond ultimately settled the lawsuit due to "intense financial and emotional pressure" (J.A. 297) and allegedly paid Jones most of the money in escrow (Pet. 11). But the notice of pendency, which was canceled two years earlier under the escrow agreement (J.A. 55), cannot be blamed for Diamond's inability to defend herself against the state-court plaintiff's claims.

petitioners completed sales of their property, albeit with "some delay and compromise." Pet. App. 22a.

The harms alleged by Betesh—who did not attempt to sell his property—have little relationship to the article 65 procedures that petitioners challenge here. Betesh complains that he faced delays in attempting to remove the notice of pendency filed by his brother. *See* Pet. 14. But Betesh obtained a state-court dismissal of his brother's lawsuit within three months of so moving. J.A. 312. Betesh then filed a motion to cancel the notice (J.A. 313), but his counsel apparently did not follow up on the motion until more than a year later (J.A. 349-350). When Betesh's counsel did finally contact the Queen's County Clerk's office, that office confirmed that the notice was still in place but agreed to remove it "immediately." J.A. 350. Even if the delay in cancellation was unwarranted, it was not caused by any of the article 65 procedures challenged here.

2. This case is also an inappropriate vehicle for resolving petitioners' First Amendment claim that article 65 denied them access to the courts. *See* Pet. 33-35. For one thing, petitioners simply did not bring this claim below. As a result, the district court did not discuss this issue, and the court of appeals considered it waived. *See* Pet. App. 15a. Although petitioners now assert that they mentioned this issue in the district court (Pet. 33 n.11), they did so only in passing (*e.g.*, J.A. 30, 319-320), and in fact never raised a free-standing denial-of-access claim—for example, none of the causes of action in petitioners' individual complaints mentions such a claim. *See* J.A. 38-39, 143, 239-240.

Even putting waiver aside, petitioners' First Amendment argument fails because it rests upon an erroneous premise. Petitioners contend that property owners cannot raise constitutional challenges to article 65 in state court. But petitioners cite no state law or state-court decision to support this bald assertion. In fact, they concede that article 65 "does not explicitly prohibit homeowners from raising a constitutional challenge." Pet. 33. And the state courts have regularly considered other legal challenges to notices of pendency. *See, e.g.*, *Sakow*, 97 N.Y.2d at 443, 767 N.E.2d at 671; *Da Silva*, 76 N.Y.2d at 444-45, 559 N.E.2d at 1272; *5303 Realty Corp.*, 64 N.Y.2d at 315, 476 N.E.2d at 278. The only support that petitioners can muster is an allegation that the state-court judge in Diamond's case "refused to adjudicate any constitutional issue." Pet. 34. But Diamond apparently filed a state-court appeal "specifically flagging the constitutional issues" before settling the case. J.A. 132. She cannot now complain that she was denied access to the courts when she voluntarily abandoned her constitutional argument.

3. Finally, this case is a poor vehicle because petitioners probably have no live claims remaining, and thus this Court would have to resolve fact-specific jurisdictional questions before reaching the merits. Petitioners likely can no longer obtain injunctive or declaratory relief for two reasons. First, as the lower courts found, petitioners' claims for equitable relief are now moot because the notices of pendency in all three actions were ultimately canceled. *See* Pet. App. 13a n.3, 56a-57a. The court of appeals expressly declined to decide whether petitioners could invoke the narrow mootness exception for cases that are capable of

repetition yet evading review. Pet. App. 13a n.3. Second, in light of these cancellations, petitioners lack standing because they cannot demonstrate the "real and immediate threat of injury necessary to make out a case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *see also Golden v. Zwickler*, 394 U.S. 103, 109 (1969). The most that petitioners can do is speculate that other property they own might, in the future, be subject to new notices of pendency from other creditors. *See, e.g.*, J.A. 297-298 (expressing concern that "[o]ther creditors" could file a notice on Diamond's "new house" and "could similarly pressure me into some sort of unfair settlement"). But such speculation is not sufficient to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

While the court of appeals presumed that petitioners still had live claims for damages (Pet. App. 13a n.3), that assumption also is questionable. As the district court found (Pet. App. 59a-60a), petitioners' damages claims against various state officials in their official capacities are not cognizable under § 1983, *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989), and in any event are barred by Eleventh Amendment sovereign immunity, *see Edelman v. Jordan*, 415 U.S. 651 663-66 (1974). This applies not only to the governor, attorney general, and comptroller, but also to the county clerks, who are deemed state officers when recording notices of pendency. *See Ashland Equities Co. v. Clerk of New York County*, 110 A.D.2d 60, 65, 493 N.Y.S.2d 133, 136-37 (1985).

Petitioners' damages claims against these officials in their individual capacities also likely fail because they

do not explain how the relevant officials had any personal involvement in allegedly unconstitutional actions. *See Parratt v. Taylor*, 451 U.S. 527, 537 n.3 (1981). The governor and attorney general had no direct involvement at all in the notices of pendency filed against petitioners. The comptroller and the county clerks[6] had some peripheral involvement (the comptroller collects fees from filings, and the county clerks record the notices), but they had no personal involvement in any of the allegedly inadequate procedures that form the gravamen of petitioners' due process claim. To put this point another way, even if a judgment in petitioners' favor here required *plaintiffs* to serve notices of pendency and *courts* to conduct more stringent probable-cause hearings, it would not alter the comptroller's and clerks' state-law obligations: the comptroller would still be required to collect fees, and the county clerks would still be required to record notices of pendency in the first instance.

Petitioners also cannot collect damages because respondents are entitled to qualified immunity. Petitioners claim injury from respondents' compliance with the state laws requiring recordation of notices of pendency. But "officials become liable for damages only to the extent that there is a clear *violation* of the statutory rights that give rise to the cause of action for damages." *Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984) (emphasis added). Furthermore, in light of the precedents upholding notice of pendency statutes like article 65, respondents' compliance with article 65 did

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[6] Only Betesh—not Diamond (J.A. 31) or Diaz (Pet. App. 53a)—has sued the county clerk in her individual capacity.

"'not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

In short, quite aside from the merits of their arguments, petitioners likely cannot obtain either equitable relief or damages at this point, meaning that they have at best "an abstract injury" that does not give rise to federal jurisdiction. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974). These jurisdictional questions are themselves fact-specific and do not merit this Court's attention. Accordingly, any consideration of the constitutionality of notice-of-pendency procedures should await a case that does not present serious jurisdictional hurdles that may prevent the Court from reaching the merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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